Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DONALD FRANCIS WILLIAMS,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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* JOSEPH P. CONTI
District Attorney for Erie County
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10pp

QUESTION PRESENTED

Whether the sexually violent predator provisions of Pennsylvania's Sexual Offenders Act, 42 Pa.C.S. §§ 9791-9799.6, violate the due process protections of the Fourteenth Amendment?

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgement is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Supreme Court Rule 10(c), 28 U.S.C. §1257(a) 1

Petitioner, the Commonwealth of Pennsylvania, respectfully petitions for a writ of certiorari to review the judgement of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The Pennsylvania Supreme Court issued an Opinion on June 30, 1999 at Number 84 Western District Appeal Docket 1997, and is reproduced in the Appendix filed herewith ("App.") at page 1a. The trial court issued an Opinion and Order on September 23, 1997 declaring that the sexually violent predator portions of the Sexual Offender Statute violate the Fifth and Fourteenth Amendments of the United States Constitution and is reproduced in the Appendix at page 42a.

STATEMENT OF JURISDICTION

On June 30, 1999, the Pennsylvania Supreme Court decided an important Federal question in a way which conflicts with relevant decisions of this court, and decided an issue that has not been, but should be, settled by this Court. This petition has been filed within ninety days of that date. Jurisdiction is conferred upon this Court pursuant to Supreme Court Rule 10(c), 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The due process clause of the 14th amendment to the United States Constitution provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". (42 Pa.C.S. §9791-9799.6 is attached as Appendix C at pages 64a through 86a.

STATEMENT OF THE CASE

The issue in this case is whether the provisions of Pennsylvania's Sexual Offenders Act violate the due process clause of the Fourteenth Amendment. Specifically, the issue relates to the Pennsylvania legislature's enactment of a statute which provides that an individual who has been convicted beyond a reasonable doubt of certain enumerated crimes is presumed to be a "sexually violent predator". The legislature provided further that the sentence for an individual convicted of one of the crimes and presumed to be a "sexually violent predator" would include a mandatory maximum penalty of life supervision which is an increase in the maximum penalty otherwise provided for these crimes in Pennsylvania's sentencing law. Minimum penalties are not affected by the sexual offender statute. The legislature further provided that an individual convicted of one of the crimes and presumed to be a sexually violent predator must be given the opportunity to rebut the statutory presumption prior to sentencing. As part of the sexually violent predator hearing, the defendant is entitled to notice, the opportunity to be heard, the right to confront and cross-examine witnesses, the right to call witnesses including expert witnesses, and the right to counsel. As a aid to the court, the legislature also required the offender to undergo an assessment encompassing a psychiatric and psychological examination. The examination is conducted by trained professionals who are members of the Commonwealth's Sexual Offender Assessment Board. The results of the assessment are provided to the parties prior to the hearing and these professionals are available to be called as witnesses by either party at the sexually violent predator hearing. If the defendant rebuts the legislative presumption by clear and convincing evidence, then he is not subject to the mandatory maximum penalty of life supervision.[1]

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[1]The sexual offender registration and notification provisions of the statute are not at issue in this matter. 42 Pa.C.S.A. §§9793, 9795, 9797, 9798.

The Pennsylvania Supreme Court held that, despite the due process protections provided in the Act, anything less than the full panoply of due process guarantees is violative of the Fourteenth Amendment. The Court found "the Act's imposition of the presumption that a person convicted of a predicate offense is a sexually violent predator, and the requirement that the offender rebut the presumption, to be constitutionally repugnant". The decision of the Pennsylvania Supreme Court is in conflict with previous rulings of this Court concerning due process. All fifty states and the District of Columbia have enacted sexual offender legislation.[2] Review of this case would address issues left

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[2]Ala.Code § 13A-11-200 (1994); Alaska Stat. §§ 12.63.010, 18.65.087 (1994); Ariz.Rev.Stat.Ann. §§ 13-3821, 41-1750(B)(1995); Ark.Code Ann.§12-12-901 (Michie 1994); Cal.Penal Code §2890 to 390.7 (West 1995); Colo. Rev.Stat.Ann. §18-3-412.5 (West 1995); Conn.Gen.Stat. §§ 54-102r (1995); Del.Code Ann. tit. 11 § 4120 (1994); D.C. Code Ann. §24-1101 to 1117 (1996); Fla.Stat. ch. 775.21 (1995); Ga.Code Ann. §42-9-44.1 (Michie 1995); Haw.Rev.Stat. § 707-743 (1996); Idaho Code §§ 18-8301 to 8311 (1995); Ill.Rev.Stat. ch. 730 para. 150/1 (1995); Ind.Code §5-2-12- 1 to 12 (1995); Iowa Code Ann. § 692A.1 to .15 (1996); Kan.Stat.Ann. § 22-4902 to 4909 (1995); Ky.Rev.Stat.Ann. § 17.510 (Baldwin 1995); La.Rev.Stat.Ann. § 15:540 to 549 (1995); Me.Rev.Stat.Ann. tit. 34-A, §§ 11003, 11004 (West 1994); Md. Ann. Code art. 27, § 792 (1997); Mass.Gen.Laws Ann. ch. 22C, § 37 (1995); Mich.Comp. Laws Ann. § 28.721 to .732 (West 1997); Minn.Stat. § 243.166 (1995); Miss.Code Ann. §45-33-1 (1995); Mo.Rev.Stat.Ann. §566.600 (1995); Mont.Code Ann. § 46-23-501 to 507 (1994); Neb. Rev. Stat. Ann. § 29-4001 to 4013 (1996); Nev.Rev.Stat. §207.151 to .157 (1993); N.H.Rev.Stat.Ann. § 632-A:12 (1994); N.J.Stat.Ann.§2C:7-1 to 7-11 (West 1994); N.M. Stat.Ann. § 29-11A-1 to 8 (Michie 1997); N.Y. Correct. Law § 168 (McKinney 1996); N.C. Gen.Stat. § 14-208.1 to .13 (1996); N.D.Cent.Code § 12.1-32-15 (1993); Ohio Rev.Code Ann. § 2950.01 (Baldwin 1995); Okla.Stat.Ann. tit. 57 § 581 to 587 (1995); Or.Rev.Stat. §§ 181.508, 181.518 (1994); 42 Pa. Cons. Stat. §9791 to 9799.6 (West 1996); R.I.Gen.Laws § 11-37-16 (1994); S.C. Code Ann. § 23-3-400 to 490 (Law. Co-op. 1996); S.D. Codified Laws Ann. §

unresolved in Kansas v. Hendricks, 521 U.S. 346 (1997) which dealt with civil commitments of sexually violent predators not criminal sentencing, as the Pennsylvania Act does. The Court should, therefore, take this opportunity to resolve this issue which is important to the legislature's enactment of similar laws across the nation and would clarify the due process protections necessary in a post-conviction sentencing context.

Defendant, Donald Francis Williams, was charged by criminal information with two counts of Involuntary Deviate Sexual Intercourse, two counts of Indecent Assault and one count of Corruption of Minors, for acts he committed against a nine year-old boy. On July 15, 1997, the defendant was found guilty of all charges by a jury. Immediately following the jury's verdict, Judge Ernest J. DiSantis, Jr. issued an Order directing the State Board to Assess Sexual Offenders to perform an assessment of the defendant as required by 42 Pa.C.S.A. §9791, et. seq., to determine if the defendant is a Sexually Violent Predator. The defendant filed a Motion for Extraordinary Relief raising a variety of constitutional challenges to selective provisions within the aforementioned cited statute. On September 23, 1997, the Court filed an Order and Opinion granting in part the constitutional challenge to Megan's Law.

The Court granted the constitutional challenge inasmuch as it relates to due process and the presumption and burden shifting portion of the statute. The Court drafted an Order and Opinion setting forth its analysis of the constitutional issues. In granting the challenge to constitutionality of the statute, the Court refused to apply the maximum penalty of life in prison as required by the statute. On October 22, 1997, the Commonwealth filed a timely Notice of Appeal. On June 30, 1999 the Pennsylvania

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22-22-30 to 39 (1995); Tenn. Code Ann. § 40-39-101 to 108 (1994); Tex.Civ.Stat.Code Ann. § 6252-13c.1 (West 1995); Utah Code Ann. § 77-27-21.5 (1994); Vt.Stat.Ann. tit. 13, § 5401 to 5413 (1996); Va.Code Ann. §§ 19.2-298.1 to 3, 19.2-390.1 (Michie 1995); Wash Rev.Code §§ 9A,44.130, 4.24.550 (1995); W.Va.Code § 61-8F-1 to 8 (1994); Wis.Stat.Ann. § 175.45 (1995); Wyo.Sta. § 7-19-301 (1995).

Supreme Court issued an Opinion agreeing with the trial court and declaring the sexually violent predator provisions of the Act to be violative of the procedural due process guarantees of the Fourteenth Amendment. Accordingly, these provisions of the Act were stricken, and the case was remanded to the Pennsylvania Superior Court for resolution of the remaining appellate issues raised at Number 14 Western District Appeal Docket 1998 which are not subject to this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Supreme Court's decision places it at odds with this Court's precedent and interprets this Court as requiring that a full panoply of trial rights is the process due to an individual who has been convicted, and is awaiting sentencing as a sexually violent predator. All fifty states and the District of Columbia have enacted sexual offender statutes to address the legitimate concerns over offenses against children in sexually violent crimes.

The provisions of 42 Pa.C.S. §§9791-9799.6 (the Act) provide that an individual who is convicted after a plea or trial of certain enumerated offenses is presumed to be a sexually violent predator and is subject to a mandatory maximum penalty of life supervision.[3] Minimum penalties are not affected by the Act. Pursuant to the Act and prior to sentencing, the court orders that the offender be examined by two members of the Sexual Offenders Assessment board who are mental health professionals. A report concerning the examination is provided to the court and, through the court, to the parties. Also prior to sentencing, the court conducts a sexually violent predator hearing to determine whether the offender is a sexually violent predator and, thus, should receive

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[3]The offenses include Rape, 18 Pa.C.S. §3121; Involuntary Deviate Sexual Intercourse, 18 Pa.C.S. §3123; Aggravated Indecent Assault, 18 Pa.C.S. §3125; and the following offenses against children: Kidnaping, 18 Pa.C.S. §2901; Prostitution, 18 Pa.C.S. §5902(b); Indecent Assault, 18 Pa.C.S. §3126; and Obscene Materials or Performances, 18 Pa. C.S. §5903(a)(3)(4)(5)(6).

the mandatory maximum penalty. At the hearing, evidence is presented for the court to consider in determining whether the presumption will apply. Prior to the hearing, the defendant is given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses, and the right to cross-examine witnesses. At all times the offender has the right to counsel and appointed counsel if necessary. At this hearing the defendant has the opportunity to rebut the legislative presumption. If the court finds that the offender has rebutted the presumption by clear and convincing evidence, he is deemed not to be a sexually violent predator and he is, therefore, not subject to the mandatory maximum penalty. Since minimum terms of incarceration are not effected, any minimum term can be imposed and the offender is eligible for parole after serving his minimum term. While under supervision on parole the offender is subject to the registration, community notification and reporting requirements of the Act. However, if the presumption is not rebutted by clear and convincing evidence and the court determines that the offender is a sexually violent predator, then the court must impose the maximum penalty of life supervision. The Pennsylvania Supreme Court erred in declaring that the due process protections set forth above are insufficient and violate the Fourteenth Amendment Due Process clause. In arriving at its decision, the Pennsylvania Supreme Court relied upon precedent of this Court and misinterpreted this precedent as setting forth the requirement that the full panoply of due process rights afforded in a criminal trial must be satisfied in this statute's sentencing context.

The Pennsylvania Court's decision to strike down the sexual offender statute violates this Court's caution in McMillan v. Pennsylvania, 477 U.S. 79 (1986) that "we should hesitate to conclude that due process bars the state from pursuing its chosen course in the area of defining crimes and prescribing penalties." Granted the Act does result in an increased penalty which includes a maximum of life supervision. However, arriving at that maximum sentence in no way alleviates the Commonwealth's burden of proof beyond a reasonable doubt at trial. It is precisely the legislature's role to determine the penalties. If the legislature merely chose a maximum penalty of life in prison for these offenses, it could have done so. Significantly, the legislature

chose life in prison as the sentence, but also afforded the opportunity to avoid this legislatively mandated penalty. As such, this sentencing scheme does not violate due process.

The Pennsylvania Supreme Court misinterpreted this court's precedent in Specht v. Patterson, 386 U.S. 605 (1967) in which the Colorado Sex Offender Act was stricken. First, the Pennsylvania Supreme Court failed to recognize the significant differences between the Colorado Act and Pennsylvania's Act. Unlike Colorado, the Pennsylvania Act merely makes the commission of certain specified crimes a basis for sentencing. This Court found that the Colorado statute actually made one conviction the basis for another proceeding, not the basis for sentencing. In addition, the Pennsylvania Supreme Court interpreted Specht to mean that, under a sentencing statute like the Act, the due process clause requires a full panoply of trial rights. This misinterpretation was highlighted by this Court in McMillan v. Pennsylvania, 477 U.S. 79 (1986), where this Court explained its decision in Specht. This Court clarified that the judge's post-trial finding in Colorado, without notice of a hearing, did not satisfy due process. This Court went on further and indicated that due process requires a right to be present with counsel, to be heard, to be confronted with and to cross examine the witnesses against him, and to offer evidence on their own behalf. Therefore, the decision in Specht does not require a full panoply of rights afforded in a criminal jury trial and every due process protection set forth in Specht exists in Pennsylvania's Sexual Offenders Act.[4]

In analyzing the constitutionality of the Sexual Offender's Act, the Pennsylvania Supreme Court failed to address the propriety of the Pennsylvania Legislature's statutory presumption, failed to analyze the validity of burden shifting in a sentencing mitigation context, and failed to recognize the strong presumption of constitutionality of acts of the legislature.

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[4]The well-reasoned dissent by Pennsylvania Supreme Court Justice Castile sets forth a similar analysis of the constitutionality of our statute.

Pennsylvania's sexual offender statute is a sentencing statute. It is found within the Pennsylvania sentencing code, its provisions only accrue after a conviction by proof beyond a reasonable doubt, it is based upon a legislative presumption founded on concern over protecting the community from convicted sexual offenders, the presumption is not a necessary element of the underlying crimes, and it addresses the penalty and parole or release conditions of a convicted offender. However, it is not just a sentencing statute, but instead is a sentence mitigation statute that allows an offender to prove that he does not deserve the maximum sentence contemplated by the legislature.

The Pennsylvania Supreme Court failed to properly analyze the propriety of burden shifting after conviction. "So long as a state's method of allocating the burden of proof does not lessen the State's burden to prove every element of the offense charged, as in this case to prove aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990). Pennsylvania's legislature did not lessen the Commonwealth's burden of proof for any element of the crime charged. Therefore, it was proper to place the burden on the convicted offender to rebut the presumption and show why he is entitled to a lesser sentence.

The Pennsylvania Supreme Court also failed to analyze the validity of the Pennsylvania legislature's presumption. As this Court has stated, a statutory presumption may be sustained if there is a rational relationship between the fact proved and the ultimate fact presumed. Tot v. United States, 319 U.S. 463, 467 (1943). "The process of making the determination of rationality is, by its nature, highly empirical" United States v. Gainey, 380 U.S. 63, 67 (1965), and significant weight must be given to the conclusions of the legislature concerning matters which are commonplace or not within specialized judicial competence. As the legislature stated in its legislative findings and declaration of policy, 42 Pa.C.S. §9791, "Sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest." Therefore, there

is a rational relationship between the conviction of one of the enumerated offenses and the presumption that such an individual is a sexually violent predator, necessitating a maximum penalty of life in prison. As such, the decision of the Pennsylvania Supreme Court significantly departs from this Court's precedent and this Court should grant the petition to determine whether due process should bar the Pennsylvania legislature from pursuing its chosen course in defining crimes and prescribing penalties. The legislature was cautious in enacting this statute, and provided all of the due process protections consistent with this Court's precedent. As a result, the due process clause of the United States Constitution should not invalidate the sexual offender sentencing statute of Pennsylvania.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari and, upon review, reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX

APPENDIX A - OPINION OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, DATED JUNE 30, 1999

[J-172A-98]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 84 W.D. Appeal Docket 1997
Appellant	:	Appeal from the Order of the Erie County Court of Common Pleas, Criminal Division, dated September 23, 1997 at No. 922 of 1997.
v.	:	
DONALD FRANCIS WILLIAMS,	:	
Appellee	:	
COMMONWEALTH OF PENNSYLVANIA,	:	No. 14 W.D. Appeal Docket 1998
Appellee	:	Appeal from the Order of the Superior Court at No. 2466PGH97 entered 3/9/98 transferring case to Supreme Court from the Judgment of Sentence of the Court of Common Pleas of Erie County, Criminal Division, entered October 1, 1997 at No. 900 of 1997.
v.	:	
DONALD FRANCIS WILLIAMS,	:	
Appellant	:	
	:	ARGUED: September 16, 1998

OPINION

MR. JUSTICE ZAPPALA **DECIDED: JUNE 30, 1999**

This matter is before us on direct appeal from the order of the Erie County Common Pleas Court dated September 23, 1997, granting Donald Francis Williams' motion for extraordinary relief, which challenged the constitutionality of the sexually violent predator provisions of Title 42, Sections 9791 -

9799.6, Subchapter H, entitled, Registration of Sexual Offenders, 42 Pa.C.S. §§ 9791 - 9799.6, commonly known as Pennsylvania's Megan's Law (hereinafter Act).[1]

The factual history of this case is as follows. On February 2, 1997, Appellee Williams was arrested and charged with numerous sexual offenses. On May 23, 1997, a criminal information was filed, charging Williams with two counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(6), two counts of indecent assault, 18 Pa.C.S. § 3126(a)(7), and one count of corruption of minors, 18 Pa.C.S. § 6301(a). The charges stemmed from an allegation that Williams performed fellatio upon a nine year old male victim during the period between May 19, 1996 through December 23, 1996 and December 24, 1996 through December 31, 1996.

A jury found Williams guilty of the foregoing charges on July 15, 1997. Immediately following the verdict, the common pleas court ordered an evaluation of Williams pursuant to Section 9794(a) of the Act, which provides that

> [a]fter conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the [State Board to Assess Sexually Violent Predators].

Williams filed a motion for extraordinary relief raising numerous federal and state constitutional challenges to the sexually violent predator provisions of the Act, 42 Pa.C.S. § 9794 - 9799.6. Among the challenges made, Williams asserted that the Act violates his procedural due process rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 of the Pennsylvania Con-

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1. Following the abduction, murder and rape of seven-year old Megan Kanka, New Jersey enacted the Registration and Community Notification Laws, Pub. L. 1994, Chs. 128, 133 (codified at N.J.S.A. 2C:7-1 to 7-11) as part of a ten-bill package referred to as "Megan's Law." By May of 1996, based upon federal legislation conditioning certain federal funding on states passing a registration and notification program, forty-nine states adopted sex offender registration laws and thirty-two states maintained some form of community registration. See *E.B. v. Verniero,* 119 F.3d 1077, 1081 (3d Cir. 1997), *cert. denied,* 118 S. Ct. 1039 (1998). See also 42 U.S.C.S § 14071.

stitution, because the Act impermissibly shifts the burden of persuasion to the offender by establishing a presumption that he is a sexually violent predator and requiring that he rebut the presumption by clear and convincing evidence. Section 9794(b) provides:

> An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa.C.S. § 9794(b).

> By opinion and order dated September 23, 1997, the common pleas court held that [b]y shifting the burden of proof to the defendant such that s/he is presumed to be a sexually violent predator and by placing the burden of rebuttal of that presumption on the defendant, [the Act] violates the Fifth and Fourteenth Amendments to the United States Constitution and Section Nine of Article One of the Pennsylvania Constitution.

Slip op. at 19.[2] Accordingly, the common pleas court refused to proceed with an assessment of whether Williams is a sexually violent predator in accordance with the Act and sentenced Williams in conformity with the sentencing guidelines applicable to his convictions.[3] The common pleas court noted that the effect of its decision was to leave intact only the purpose, definition, registration and some administrative provisions of the Act. Slip op. at 20, n. 11.

The Commonwealth filed a direct appeal from the order of the common pleas court to this Court,[4] complaining that the

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2. The court rejected all other constitutional claims raised by Williams regarding the Act. These included challenges concerning the Act's vagueness, the right against self-incrimination, and the right to counsel in the assessment process. The court also rejected the argument that the Act constitutes a bill of attainder and violates the right to privacy.

3. Williams received an aggregate sentence of 10 years, 9 months to 45 years imprisonment.

4. Pursuant to Section 722(7) of the Judicial Code, 42 Pa.C.S. § 722(7), this Court has exclusive jurisdiction of appeals from final orders of the common pleas court in

> [m]atters where the court of common pleas has held invalid as

common pleas court improperly declared the applicable provisions of the Act to be unconstitutional.[5] Before specifically addressing the arguments made by the Commonwealth regarding the constitutionality of the Act, a brief outline of its provisions and the statutory scheme set forth therein by the Legislature is instructive.

The Act is basically divided into two parts. Section 9794 of the Act and certain provisions that follow apply to those "offenders" who are designated "sexually violent predators." Section 9793 of the Act applies to "offenders" who are not classified as sexually violent predators. A person is an "offender" for purposes of the Act if he or she has been convicted of any of the offenses specified in Section 9793(b). Subsection (1) of Section 9793(b) lists applicable predicate offenses where the victim is a minor. The offenses specified include the crimes of kidnapping (except by a parent), rape, involuntary deviate sexual intercourse, aggravated indecent assault, promoting prostitution, and crimes relating to obscene and other sexual materials and performances involving minors. Subsection (2) sets forth predicate offenses involving victims of any age and includes rape, involuntary deviate sexual intercourse, aggravated indecent assault and spousal sexual abuse. Indecent assault is also a predicate crime when the offense is a misdemeanor of the first degree. 42 Pa.C.S. § 9793(b)(3).

NOTES *(Continued)*

repugnant to the Constitution, treaties or laws of the United States, or the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter.

5. Williams filed a timely notice of appeal to the Superior Court from the trial court's decision and the Commonwealth filed a motion to quash the appeal. The Superior Court then transferred the matter here. On appeal, Williams asserts that the trial court erred in denying his remaining constitutional challenges to the Act; he also alleges various trial errors.

A person who is convicted of any of the foregoing predicate offenses is presumed to be a sexually violent predator. 42 Pa.C.S. § 9794(b). The Act defines a "sexually violent predator" as

> [a] person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

42 Pa.C.S. § 9792.

There is a distinct difference under the Act between the requirements and sanctions applicable to those persons who are classified as sexually violent predators and those who are not. Those offenders who are not classified as sexually violent predators are subject to the registration requirements set forth at Section 9793 of the Act. This provision requires that an offender register a current address with the Pennsylvania State Police upon release from incarceration, being placed on parole, the commencement of a sentence of intermediate punishment or probation, or under the parole board's supervision. The State Police must be notified of an offender's change of address and a current address must be registered. The period of registration under this provision is ten years and failure to comply with the provision is a felony of the third degree.[6]

If a person is classified as a sexually violent predator under the Act, he or she is subjected to much broader registration and notification requirements. Specifically, Section 9795(a) of the Act requires potentially lifetime registration of a current address with the State Police "unless the court deter-

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6. The validity of the ten-year registration provisions is not before us. But see *Commonwealth v. Gaffney*, No. 65 M.D. Appeal Docket 1998 (filed June 30, 1999), where we upheld these provisions when faced with an ex post facto challenge thereto.

mines the person is no longer a sexually violent predator." Verification of a current address is required every 90 days. 42 Pa.C.S. § 9796(a).

Section 9797(b) of the Act specifies that the crime victim of a sexually violent predator shall be given written notice when an offender registers an address initially, and when a change of address is provided. Section 9798(a) provides for extensive public notification of the name, address, offense, designation and photograph of sexually violent predators. Subsection (b) specifies that notification of the foregoing information is to be given to the neighbors of sexually violent predators, the director of county child and youth services where the sexually violent predator resides, the superintendent of each school district in the area, including private and parochial schools, the director of licensed day care facilities in the municipality where the sexually violent predator resides and the president of any college, university and community college located within 1,000 feet of a sexually violent predator's residence.

In addition to the foregoing, Section 9799.4(a) of the Act provides for enhanced punishment of sexually violent predators. Specifically, this section provides that once a person is classified as a sexually violent predator, "the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) ... shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses." Subsection (b) of this provision requires sexually violent predators to attend monthly counseling sessions and subsection (c) provides that

> [n]otwithstanding any other provision of law to the contrary, when a person who has been designated as a sexually violent predator is convicted of a subsequent sexually violent offense, the mandatory sentence shall be life imprisonment....

42 Pa.C.S. § 9799.4.

The issue here involves the constitutionality of the method by which offenders are designated sexually violent predators. As noted, once a person is convicted of one of the predicate offenses specified in Section 9793(b) of the Act, he

or she shall be presumed to be a sexually violent predator. 42 Pa.C.S. § 9794(b). Despite the fact that this presumption attaches upon conviction, the Act requires that after conviction, but before sentencing, the State Board to Assess Sexually Violent Predators conduct an assessment to determine if the offender is a sexually violent predator.[7] Section 9794(c) of the Act lists ten factors that the Board should consider in making such determination.[8] The offender does not participate in the assessment proceeding by the Board.

Following its assessment, the Board is required to submit a written report to the trial court within 60 days of the offender's conviction. Section 9794(e) specifies that

> [u]pon receipt of the Board's report, the trial court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order....

As noted, throughout the foregoing proceedings by the Board and the trial court, the presumption that the offender is a sexually violent predator continues. It is the offender who

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7. The Board is to be composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3(a).

8. These include the offender's age, any prior criminal record, the age of the victim, whether the offense involved multiple victims, the use of illegal drugs, whether the offender completed any prior sentence and attended sex offender programs, any mental illness or mental disability, the nature of the sexual contact and whether there is a demonstrated pattern of abuse, whether unusual cruelty was involved, and any behavior characteristics that contribute to the offender's conduct.

bears the burden of rebutting the presumption and the standard of proof required to rebut the presumption is clear and convincing evidence. 42 Pa.C.S. § 9794(b). It is these requirements that the trial court found offensive to procedural due process.

The Commonwealth and the Attorney General, as amicus, argue that the trial court erred in concluding that the proceeding to determine whether an offender is a sexually violent predator is violative of procedural due process. While both concede that a sentencing proceeding is subject to the requirements of due process, they maintain that because the presumption that an offender is a sexually violent predator arises after an offender has been found guilty beyond a reasonable doubt of one of the enumerated offenses specified in the Act, the full panoply of procedural rights are no longer due. Moreover, they maintain that the Act comports with due process in that it provides an offender with specific due process protections including the right to present evidence and call witnesses before the factfinder, the right to present expert witnesses and cross-examine witnesses, and the right to have counsel present, including the right to have counsel appointed.

Both the Commonwealth and the Attorney General liken the sexually violent predator provisions of the Act to the mandatory minimum sentencing provision that withstood constitutional scrutiny by this Court and the United States Supreme Court in *Commonwealth v. Wright*, 508 Pa. 25, 494 A.2d 354 (1985), affirmed *McMillan et al. v. Commonwealth*, 477 U.S. 79 (1986).

To the contrary, Appellee and amici, the American Civil Liberties Union of Pennsylvania and the Public Defender Association of Pennsylvania, argue that the procedure whereby it is determined whether an offender is a sexually violent predator under the Act is more akin to the provisions struck down as violative of due process by the United States Supreme Court in the case of *Specht v. Patterson*, 386 U.S. 605 (1967); see also *Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir. 1966), and *Commonwealth v. Dooley*, 209 Pa. Super. 519, 232 A.2d 45 (1967).

In *Wright,* we upheld the constitutionality of Section 9712 of the Mandatory Minimum Sentencing Act, 42 Pa.C.S. § 9712, which requires the imposition of a minimum sentence of five years' total confinement upon a finding that a person was in visible possession of a firearm during the commission of certain felonies. At issue was subsection (b) of Section 9712, which provides:

> (b) Proof of sentencing. — Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

There, we addressed five consolidated decisions concerning the constitutionality of Section 9712. In all five cases, the defendants had been convicted of one of the enumerated offenses set forth at Section 9712 and the Commonwealth sought to proceed thereunder. In four of the decisions under review, the trial court determined the provision to be unconstitutional and declined to apply Section 9712. In the remaining case, a constitutional challenge was rejected and the defendant was sentenced to the mandatory minimum sentence of five years' imprisonment.

The trial courts that found this section to be constitutionally infirm did so based upon the conclusion that the preponderance standard is violative of procedural due process, because, contrary to the statutory language, visible possession of a firearm is an element of the crime for which the defendant is being sentenced. Accordingly, in compliance with the United States Supreme Court's decisions in *In re Winship*, 397

U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the courts held that proof beyond a reasonable doubt of this fact was required.[9]

We rejected this rationale, noting that the statutory language explicitly provides that visible possession of a firearm is not an element of the crime and that the reasonable doubt standard, traditionally, has been dependent on "how a state defines the offense." *Wright*, 508 Pa. at 34, 494 A.2d at 359, quoting *Patterson v. New York*, 432 U.S. 197, 211, n. 12 (1977). We stressed that Section 9712 comes into play only after there has been a conviction of one of the underlying enumerated felonies and that there is neither an increase in the maximum sentence for such felony nor a separate sentence imposed. We noted,

> [i]n making visible possession of a firearm a sentencing factor to be considered only after conviction of specified offenses, the legislature has in no way relieved the prosecution of its burden of proving guilt. Section 9712 creates no presumption as to any essential fact and places no burden on the defendant. Thus under *Winship* , *Mullane* and *Patterson* the Due Process Clause does not require that visible possession be treated as an element of the underlying offense to be proved beyond a reasonable doubt.

Wright 508 Pa. at 35-36, 494 A.2d at 358.

The United States Supreme Court upheld our decision in *Wright*, also noting that because visible possession of a firearm is not an element of the underlying crimes, which, undoubtedly, the state must prove beyond a reasonable doubt, but instead is a sentencing factor that comes into play only after the defendant has been found guilty, the convicted defendant is not entitled to the full panoply of due process protections. The Court noted:

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9. In *Winship*, 397 U.S. at 364, the Court stated:

Lest there be any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

> Indeed, the elements of the enumerated offenses, like the maximum permissible penalties for those offenses, were established long before the Mandatory Minimum Sentencing Act was passed. While visible possession might well have been included as an element of the enumerated offenses, Pennsylvania chose not to redefine those offenses in order to so include it, and Patterson teaches that we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.

McMillan, 477 U.S. at 86. The Court, however, recognized that in certain circumstances, the State's authority in this regard was not unlimited:

> [O]f course, there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship's* reasonable doubt requirement applies to facts not formally identified as elements of the offense charged.

Id.

Finally, the Court noted that the situation a convicted defendant faced pursuant to Pennsylvania's Mandatory Minimum Sentencing Act was quite unlike the situation faced by a criminal defendant in *Mullaney*, where the Court struck down Maine's homicide statute. In *Mullaney*, a single generic offense of felonious homicide was enacted with three "punishment categories" based on degree of culpability. Under the statute, intent was not an element of the crime, but had bearing only on the appropriate punishment category. As a result, "Maine could impose a life sentence for any felonious homicide — even one that traditionally might be considered involuntary manslaughter — unless the defendant was able to prove that his act was neither intentional nor criminally reckless." *Mullaney*, 421 U.S. at 699 (emphasis in original) (footnote omitted). In distinguishing the facts in *McMillan*, the Court noted:

> The Court in *Mullaney* observed, with respect to the main criminal statute invalidated in that case, that once the State proved the elements which Maine required it to prove beyond a reasonable doubt the defendant faced "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." 421 U.S. at 700. In the present

> case the situation is quite different.... Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the specified finding of visible possession of a firearm. Section 9712 "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioner's claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished — that Pennsylvania has in effect defined a new set of upgraded felonies — would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment ... but it does not.

McMillan, 477 U.S. at 87-88 (footnote omitted) (citation omitted).

In *Specht*, which was decided before *McMillan* and upon which Appellee relies, the United States Supreme Court struck down Colorado's Sex Offenders Act as violative of procedural due process. The petitioner in *Specht* was convicted of the crime of indecent liberties under a Colorado statute which provided a maximum sentence of 10 years; he was, however, sentenced under the Sex Offenders Act for an indeterminate term of from one day to life imprisonment. The Sex Offenders Act was implicated where the trial court believed that a person convicted of specified sex offenses, "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.*, 386 U.S. at 607.

The petitioner's complaint stemmed from the proceedings whereby the critical finding to be made under the Sex Offenders Act was reached without a hearing or the right to confront witnesses. The Court, in finding the proceedings under the Colorado Act to be unconstitutional, held:

> These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection

> Clause of the Fourteenth Amendment ... and to the Due Process Clause. We hold that the requirements of due process were not satisfied here. The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. *That is a new finding of fact that was not an ingredient of the offense charged.* The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.

Id. at 609 (citations omitted) (footnote omitted) (emphasis added).

Prior to the Court's decision in *Specht*, the Court of Appeals for the Third Circuit struck down a similar provision in this State's Barr-Walker Act. The Third Circuit's analysis focused on the penal nature of the proceedings under Barr Walker in finding the Act to be invalid.

> The Act leaves no doubt, both in its language and its purpose, that it is a criminal statute and that what is imposed under its authority is criminal punishment. Its title and its text are replete with language which reveals that the proceeding is penal in nature. It may be invoked only after a precedent conviction of guilt of one of the specified crimes and prescribes a new and radically different punishment. A maximum sentence of life imprisonment is made mandatory and from it the defendant may only be released on the determination by the Pennsylvania Board of Parole that the "interest of justice" so dictates. It is true that the Act provides for periodic psychiatric and psychological examinations which the Board of Parole is to review. But it is no less a criminal proceeding and no less the infliction of criminal punishment because the Act provides for such studies, especially when this is accompanied by the drastic potential of life imprisonment if they do not affirmatively provide a basis for release. This criminal punishment does not lose its characteristic

> because the Act goes beyond simple retribution. "it would be archaic to limit the definition of 'punishment' [under the Bill of Attainder Clause] to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."

Gerchman, 355 F.2d at 309-310, citing *United States v. Brown*, 381 U.S. 437 (1965).

Agreeing with the Third Circuit's analysis, the *Specht* Court noted what process is due under the statutory scheme set forth by the Colorado and Pennsylvania legislatures:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.

Id., 386 U.S. at 608-609, citing *Gerchman*, 355 F.2d at 312.

As noted, the Court had the benefit of its *Specht* decision when reviewing our determination in *Wright*. A similar argument to the one advanced by Appellee here, i.e., that *Specht* requires that the Act be invalidated, was put forth by the petitioners in *Wright/McMillan*. The Court, however, distinguished the post-trial proceeding in *Specht* from the one faced by the petitioners in *Wright/McMillan*.

> [T]he Court in *Specht* observed that following trial the Colorado defendant was confronted with "a radically different situation" from the usual sentencing proceeding. The same simply is not true under the Pennsylvania statute. The finding of visible possession of a firearm of course "ups the ante" for a defendant, or it would not be

> challenged here; but it does so only in the way that we have previously mentioned, by raising the minimum sentence that may be imposed by the trial court.

McMillan, 477 U.S. at 89.

Finally, the *McMillan* court recognized that analysis in this area is dependent upon differences of degree in the statutory scheme set forth by state legislatures.

> [W]e have noted a number of differences between this case and *Winship*, *Mullane*, and *Specht*, and we find these differences controlling here. Our inability to lay down any "bright line" test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results. We have no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.

Id. at 91.

Given the foregoing guidance, just as the Court in *McMillan* had no doubt that this State's Mandatory Minimum Sentencing Act fell on the permissible side of the constitutional line, we have no doubt that the sexually violent predator provisions of the Act fall on the impermissible side.

Initially, we note that the proceedings whereby one is determined to be a sexually violent predator set forth in the Act are more akin to the provisions found in *Specht* and *Gerchman* than the provision at issue in *McMillan*. As in *Specht* and *Gerchman*, the determination of whether one is a sexually violent predator is a separate factual question that commences following an offenders conviction of one of the specified offenses found in the Crimes Code. Specifically, the court is faced with factually determining whether the convicted offender is a person who "due to a mental abnormality or personality disorder . . . [is] likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. The Act defines mental abnormality as "[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the

commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." *Id.*

Once the foregoing factual determination is made, the sexually violent predator is subjected to heightened criminal punishment pursuant to the Act. Specifically, as previously noted, the mandatory maximum penalty for conviction of a predicate offense is increased to the offender's lifetime. 42 Pa.C.S. § 9799.4(a). Moreover, a subsequent conviction subjects the offender to a mandatory sentence of life imprisonment. 42 Pa.C.S. § 9799.4(c). Thus, despite the fact that the legislature intended that the Act serve as "a means of assuring public protection," by increasing the punishment for the listed predicate offenses where the offender is determined to be a sexually violent predator, the goals of the sexually violent predator provisions are equally punitive.[10] Unlike the situa-

10. We wish to note that the "Declaration of policy" set forth by the Legislature at Section 9791 (b) of the Act merely references the registration and notification provisions and the goals sought by the Legislature regarding their enactment. Section 9791 (b) provides:

> It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to member of the general public as a means of assuring public protection and shall not be construed as punitive.

The Act is silent with respect to the Legislature's intention regarding the increased criminal sanctions to be imposed upon sexually violent predators; however, as noted by the *Gerchman* court, "[o]ne of the reasons society imprisons those convicted of crimes it to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Gerchman*, 355 F.2d at 310.

Given that we view the increased criminal sentencing provisions applicable to sexually violent predators to be punitive, we need not reach the additional argument put forth by Appellee that the enhanced notification provisions imposed on those who are deemed to be sexually violent predators are, likewise, punitive.

tion in *Wright/McMillan*, where a person found to be in visible possession of a firearm was required to be sentenced to a minimum term of 5 years, a sentence encompassed within the purview of the sentencing guidelines for the crimes charged, the Act expands the maximum sentence to be imposed for the predicate crimes to a mandatory life sentence if the offender is found to be a sexually violent predator.[11]

The Commonwealth argues that *Specht* is distinguishable from the facts here because the Colorado statute at issue failed to provide a convicted defendant with a right to be present, to be heard or to confront and cross-examine witnesses regarding the relevant factual determination in that case (i.e., whether a person convicted of specified sex offenses, "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill.') *Specht,* 386 U.S. at 607. The Commonwealth points out that pursuant to the Act, an offender is given notice of the hearing wherein the trial court is to determine whether he or she is a sexually violent predator. Also, an offender is provided an opportunity to be heard, confront witnesses and be represented by counsel. 42 Pa.C.S. 9794(e). Thus, the Commonwealth argues that sufficient due process is afforded to an offender pursuant to the Act unlike under the Colorado provision at issue in *Specht.*

Initially, we point out that although a convicted offender is afforded the foregoing procedural rights at the hearing before the trial court, because of the presumption set forth in the Act, he or she is already considered to be a sexually violent predator and is, essentially, afforded no due process regarding this finding. The due process rights afforded an

11. The predicate offenses listed in Section 9793(b) range from a misdemeanor of the first degree to a felony of the first degree. See 18 Pa.C.S. § 2901 (kidnapping, F-1), § 3121 (rape, F-1), § 3123 (involuntary deviate sexual intercourse, F 1), § 3125 (aggravated indecent assault, F-2), § 3128 (a) & (b) (spousal assault, F 2), § 5902(b) (prostitution, F-3), § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances, M-1). The maximum sentence for a misdemeanor of the first degree is 5 years' imprisonment. 18 Pa. C.S. § 1104(1). The maximum sentence for a felony in the first degree, the most serious offense, is 20 years' imprisonment. 18 Pa C.S. § 1103(1).

offender at the hearing before the trial court are granted for the purposes of providing an offender the opportunity to rebut the presumption that he or she is a sexually violent predator.

Additionally, contrary to the Commonwealth's assertion that the Act is constitutionally sound because an offender is afforded some due process protections, the *Specht* court was not concerned with the convicted offender under the Colorado scheme receiving *some form* of due process rights. To the contrary, given that the Court viewed the proceeding set forth in the act as a separate fact finding endeavor, the end result of which subjected the defendant to additional criminal punishment, the Court agreed with the court in *Gerchman* that "[a]t such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to *the full panoply of relevant protections* which due process guarantees in state criminal proceedings." *Specht*, 386 U.S. at 608-609, citing *Gerchman*, 355 F.2d at 312.

As the foregoing reveals, the *Specht* Court would not have been satisfied with a convicted defendant receiving partial due process protections under the statutory scheme set forth by the Colorado Legislature.[12] Nevertheless, this is precisely what the Commonwealth advocates here. Given our view, however, that the proceeding set forth in the Act to determine whether one is a sexually violent predator is a separate factual determination, the end result of which is the imposition of criminal punishment, we hold that anything less than the full panoply of the relevant protections which due process guarantees is violative of the Fourteenth Amendment. Accordingly, we find the Act's imposition of the presumption that a person convicted of a predicate offense is a sexually

12. We are not unaware that *Winship* was decided after *Specht*. Nevertheless, it is without question that the due process considerations articulated by the Court in *Winship* are part and parcel to the "full panoply of relevant protections which due procees guarantees in state criminal proceedings." Thus, we find unpersuasive any argument that the due process considerations advocated in *Winship* are somehow inapplicable where it is determined that one is entitled to the full panoply of due process protections.

violent predator, and the requirement that the offender rebut the presumption, to be constitutionally repugnant.[13]

We are aware that in analyzing the constitutionality of any statutory provision, there is a strong presumption that legislative enactments do not violate the constitution. *Commonwealth v. Barud,* 545 Pa. 297, 304, 681 A.2d 162, 165 (1996). There is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. *Id.* Moreover, a statute "will only be found unconstitutional if it clearly, palpably and plainly violates the constitution." *Id.,* citing *Commonwealth v. Mikulan,* 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983).

Nevertheless, even if we were to view the post-conviction proceeding set forth in the Act to be a mere sentencing proceeding where the court is charged with considering sentencing factors as advocated by the Commonwealth, we are still not persuaded that the statutory scheme set forth by the Legislature in the Act is constitutionally sound.

In *Wright,* this Court discussed whether the preponderance of the evidence standard set forth at Section 9712(b) satisfied the dictates of due process. Initially, we recognized that even in a sentencing proceeding, due process requirements are applicable. We noted:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhay,* 389 U.S. 128

13. While it is not our province to guide the legislature in drafting relevant legislation, we point out that the United States Supreme Court recently upheld Kansas's Sexually Violent Predator Act in *Kansas v. Hendricks,* 521 U.S. 346 (1997), where a substantive due process challenge was raised. There, Kansas specified civil commitment for those offenders found to be sexually violent predators due to a "mental abnormality." Significantly, pursuant to the scheme set forth by the Kansas Legislature, if civil commitment is sought, a trial is conducted and the burden of proving beyond a reasonable doubt whether the individual is a sexually violent predator is upon the State. See *id.* at 353.

(1967); *Specht v. Patterson,* 386 U.S. 605 (1967). The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. See *Witherspoon v. Illinois*, 391 U.S. 510, 521-523 (1968); *Gardner v. Florida,* 430 U.S. 349, 358 (1977) (footnote omitted).

Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded the "entire panoply of criminal trial procedural rights." *Id.* at 358 n. 9. As the United States Supreme Court has explained:

Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural protections as the particular situation demands.... Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, , 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d 484(1972).

Id. 508 Pa. at 36-37, 494 A.2d at 359-360.

We then set forth the relevant due process considerations when evaluating the appropriate standard of proof in a given situation. Citing the analysis set forth by the United States Supreme Court in *Santosky v. Kramer,* 455 U.S. 745 (1982), we noted:

In *Addington v. Texas* 441 U.S. 418 (1979), the Court, by unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be

distributed between the litigants.

Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos(e) almost the entire risk of error upon itself."

The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has traditionally been left to the judiciary to resolve." "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'

This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." Notwithstanding "the state's 'civil labels and good intentions,'" the Court has deemed this level of certainty necessary to preserve fundamental fairness in a

> variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."

Wright 494 A.2d at 359-361 (footnotes omitted), citing *Santosky v. Kramer*, 455 U.S. 745, 754-756 (citation omitted).

In *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976), the Court articulated the specific factors courts should consider in determining the appropriate standard of proof required by the Fourteenth Amendment:

> (O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In *Wright* , we compared the liberty interest of a defendant convicted of a serious felony, whose right to remain free from confinement has been extinguished and whose maximum permissible term of imprisonment remained unaffected, with the Commonwealth's countervailing and important interest in seeking to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally. In weighing the two, we held that

> it is reasonable for the defendant and the Commonwealth to share equally in any risk of error which may be present in the factfinding process. In the context of a section 9712 proceeding, moreover, the risk of error is slight. Visible possession of a firearm is a straightforward issue susceptible of objective proof. There is scant potential that suspicion and conjecture will enter into the factfinder's decision. In addition, evidence of visible possession is amenable to meaningful appellate review.

Wright 494 A.2d at 362.

More recently, the Third Circuit in *Verniero,* engaged in the foregoing analysis in relation to New Jersey's Registration

and Community Notification Laws, i.e., Megan's Law. While there are many differences between New Jersey's registration and notification provisions and the Act established by our Legislature, many relevant similarities exist between the two statutes. For example, similar to our Act, under the statutory scheme set forth by New Jersey's Legislature, all persons convicted of a designated predicate crime involving sexual assault are subjected to certain registration requirements.[14] Pursuant to New Jersey's scheme, this information provides a basis for further community notification. The prosecutor of the county where the registrant intends to reside and the prosecutor from the county of conviction then use the registration information to assess the risk of re-offense by a registrant. Three tiers regarding a registrant's likelihood of re-offending are established, tier 1 representing a low risk of re-offense and tier 3 representing a high risk.

The extent of the public notification required of a particular registrant depends upon the classification established by the prosecutors. Under tier 1, only law enforcement officials are notified of a registrant's whereabouts. Tier 2 and 3 require more extensive public notification to schools, community organizations, day care centers and other organizations, Unlike our Act, New Jersey's Act does not provide for an increase in the mandatory maximum sentence for those found to be at a moderate (tier 2) or high (tier 3) risk for re-offending.

Under amended procedures established by New Jersey's Supreme Court, the state was required to make available a pre-notification judicial review process for sex offenders who wished to contest their classification or the notification plan. See *Doe v. Portiz,* 662 A.2d 367, 382 (N.J. 1995). Similar to our Act, the registrant at such proceeding bore the burden of persuasion. The standard of proof required under New Jersey's scheme was a preponderance of the evidence.

The *Verniero* court held that the foregoing scheme violated the procedural due process rights of a registrant. Initially,

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14. The registration requirements found in New Jersey's Act were upheld by the Third Circuit in *Artway v. Attorney General,* 81 F.3d 1235 (3rd Cir. 1996)

the court concluded that the notification provisions applicable to tier 2 and 3 registrants are non-punitive. *Verniero,* 119 F.3d at 1105. Next, the court applied the test set forth in *Mathews,* observing that

> [n]otification puts the registrant's livelihood, domestic tranquility, and personal relationships all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least 15 years. As the New Jersey Supreme Court recognized in *Doe,* a registrant thus has a compelling interest in an accurate and reasonable disposition of the issues before the court in a Megan's Law hearing.

Id. at 1107. The court then noted the state's "compelling interest in protecting its citizens by giving prompt notification to potential victims and relevant caregivers with respect to registrants who are accurately determined to be Tier 2 or Tier 3." *Id.* Conversely, the court recognized that "the state has no substantial interest in notifying persons who will not come into contact with the registrant; nor has it any interest in notifying those who will come into contact with a registrant who has erroneously been identified as a moderate or high risk." *Id.* at 1107-8. Given the foregoing competing interests, the court concluded that the burden of proof must remain with the state if the risk of error will be materially reduced without materially impairing the state's ability to secure a prompt determination and without imposing substantial new administrative burdens. *Id.*

The court then noted that an assessment of the future dangerousness of a particular registrant is a necessary inquiry at the "Megan's Law hearing," an undertaking "involving substantial uncertainty." The court observed that the fact-finding function involved is made difficult because sex crimes generally have a limited number of witnesses which creates the need for credibility determinations. Further, the issues are resolved in a proceeding in which the rules of evidence are not applied and the proceedings have a strict timetable. Thus, the court

concluded that placing the burden of persuasion on the prosecutor will substantially reduce the risk of an erroneous outcome. The court noted:

> Courts are human institutions and there is, of course, risk of error in every judicial proceeding. . . . When the court in a Megan's Law hearing simply cannot tell which of two conflicting accounts (regarding the use of force, perhaps) represents the historical truth, allocation of the burden of persuasion is likely to be outcome determinative. The same is true in those cases in which the trier of fact finds inconsistencies or implausible elements in the victim's account, but, at the same time, is inclined to discount the registrant's account because of his criminal history or the enormity of his stake in the outcome. In these cases, as well as others in which the trier of fact discounts the account of the registrant for similar reasons, requiring the prosecutor to affirmatively convince the court of the important facts can be expected to materially reduce the risk of error.

Id. at 1109.

Finally, the *Verniero* court concluded that assignment of the burden of proof to the state would not materially impair the state's ability to receive a prompt determination or impose new administrative burdens.

Although we are not bound by the Third Circuit's analysis of New Jersey's Megan's Law, and despite the differences between the two provisions, we find the foregoing analysis to be equally applicable to the sexually violent predator provisions found in the Act, if not more so.[15]

Notwithstanding the private interest in avoiding the mandatory maximum life sentence applicable to sexually violent predators, the private concerns articulated by the *Verniero*

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15. The Superior Court likewise found the *Verniero* court's analysis regarding whether the state or the offender should bear the burden of proof at the sexually violent predator hearing to be persuasive. See *Commonwealth v. Hayle*, 719 A.2d 763 (Pa. Super. 1998) (where the court struck as unconstitutional Section 9794 and all remaining provisions of the Act that refer to the designation of a sexually violent predator).

court apply equally to the notification provisions applicable to sexually violent predators. One's livelihood, domestic tranquility and personal relationships are unquestionably put in jeopardy by the notification provisions. Conversely, as noted in *Verniero*, the state has a compelling interest in protecting its citizens by providing prompt information to potential victims of sexually violent predators. The state, however, has no legitimate interest in notifying the public of those persons who have been erroneously identified as sexually violent predators. Thus, the state has an interest in assuring that the classification system is both fair and accurate.

Unlike the situation in *Wright/McMillan*, where the determination of whether one was in visible possession of a firearm was a "straightforward issue susceptible of objective proof" and where "the risk of error [was] slight," here, as in *Verniero*, a subjective assessment of an offender's potential future dangerousness is a necessary inquiry in determining whether one is a sexually violent predator. As noted, the Board, in making its assessment considers a variety of elements in reaching its determination regarding whether an offender is a sexually violent predator. Additionally, just as in *Verniero*, the evidence that could be presented at the sexually violent predator proceeding may not have been presented at trial and will largely consist of the testimony of the offender and the victim. Resolution of issues regarding the evidence presented at the proceeding are not subject to the rules of evidence according to the Act and the court is under a time restriction to conduct the proceeding. Accordingly, the risk of an error at a sexually violent predator proceeding is far greater than was present in *Wright/McMillan*.

Given the foregoing analysis, we believe that the state must bear the burden of demonstrating that an offender is a sexually violent predator.[16] Where resolution of competing

16. We do not perceive any material impairment to the state's ability to receive a prompt determination of the issues involved. All of the relevant information available to the board in issuing an assessment would also be available to the prosecution. Moreover, we do not find that placing the burden of proof on the state at the sexually violent predator proceeding would impose new administrative burdens. In fact, because the state would be in a

facts is outcome determinative, "requiring the prosecutor to affirmatively convince the court of the important facts can be expected to materially reduce the risk of error." *Verniero,* 119 F.3d at 1109.

Based on the foregoing, we find the sexually violent predator provisions of the Act to be violative of the procedural due process guarantees of the Fourteenth Amendment.[17] Accordingly, we strike all of the relevant provisions of the Act pertaining to sexually violent predators and remand the matter to the Superior Court for further disposition of the remaining issues raised on appeal.[18]

Jurisdiction relinquished.

Mr. Justice Castille files a Dissenting Opinion.

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position to forgo pursuing an inquiry before the trial court where the state did not perceive the offender to be a sexually violent predator, placing the burden on the state could actually reduce the administrative burdens involved.

17. Because we conclude that the trial court properly determined that the Act is violative of the procedural due process requirements of the Fourteenth Amendment, we need not address the remaining constitutional challenges raised, or analyze the due process provisions of the State Constitution since the federal constitution establishes certain "minimum" standards, which each state has the power to expand. See *Commonwealth v. Edmunds,* 526 Pa. 374, 894 (1991).

18. We are not unaware that the statutory notes following Section 9791 of the Act specify that the provisions of the Act are to be construed as severable; however, because we find that the procedure whereby one is determined to be a sexually violent predator is unconstitutional, we strike all of the provisions referring to this designation.

[J-172A-98]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	84 W.D. Appeal Docket 1997
Appellant	:	Appeal from the Order of the Court of Common Pleas of Erie County, Criminal Division, at No. 922 of 1997 entered September 23, 1997.
v.	:	
DONALD FRANCIS WILLIAMS,	:	
Appellee	:	ARGUED: September 16, 1998
COMMONWEALTH OF PENNSYLVANIA,	:	14 W.D. Appeal Docket 1998
Appellee	:	Appeal from the Order of the Superior Court at No. 2466PGH97 entered 3/9/98 transferring case to Supreme Court from the Judgment of Sentence of the Court of Common Pleas of Erie County, Criminal Division, entered October 1, 1997 at No. 900 of 1997.
v.	:	
DONALD FRANCIS WILLIAMS,	:	
Appellant	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: JUNE 30, 1999**

I respectfully dissent because I do not believe that the provisions of the Registration of Sexual Offenders Act, commonly known as Pennsylvania's Megan's Law, 42 Pa.C.S. §§ 9791-9799.6, ("Act"), which impose the presumption that a person convicted of a sexually violent offense is a sexually violent predator and require the offender to rebut the presumption by clear and convincing evidence, violate the procedural due process guarantees of the Fourteenth Amendment

to the United States Constitution.[1] The majority espouses that these provisions of the Act create an additional element to the predicate offenses which subjects the offender to additional punishment. Therefore, according to the majority, an offender subjected to these provisions is entitled to due process of law, which the Act fails to provide.

I agree with the majority that the Act is punitive insofar as it mandates sentences of imprisonment.[2] However, contrary to the majority, I believe that the Act is a mere sentencing scheme and does not create a separate criminal offense. Therefore, while an offender subject to the Act is entitled to due process, I believe that the Act provides all the process that is due.

Under the Act, if an offender is convicted of one of the predicate offenses listed in section 9793(b)(1),[3] the State Board to Assess Sexually Violent Predators ("Assessment Board") conducts an assessment of the offender prior to the imposition of sentence.[4] The Act defines a sexually violent predator as "[a] person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e)

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1. The majority opinion rests solely on the Fourteenth Amendment to the United States Constitution and does not address the due process provisions of the Pennsylvania Constitution.

2. Sections 9799.4 (a) and (c) require a mandatory maximum sentence of life imprisonment for sexually violent predators, and an automatic life sentence for sexually violent predators who are convicted of a subsequent sexually violent offense.

3. The predicate offenses are broken down into those involving minors and those involving victims of any age. The predicate offenses involving minors include kidnapping by someone other than a parent, rape, involuntary deviate sexual intercourse, aggravated indecent assault, promoting prostitution, and crimes relating to obscene and other sexual materials and performances. 42 Pa.C.S. § 9793(b)(1). The offenses involving a victim of any age include rape, involuntary deviate sexual intercourse, aggravated indecent assault, spousal sexual abuse and indecent assault which constitutes a first degree misdemeanor. 42 Pa.C.S. § 9793(b)(3).

4. The Assessment Board consists of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3 (a).

(relating to designation of sexually violent predators) due to mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. Accordingly, not all individuals who commit crimes of sexual violence are ultimately deemed sexually violent predators.

The Assessment Board gathers information on the offender for the purpose of determining whether the offender is a sexually violent predator. The Assessment Board considers the various factors set forth in section 9794(c), including the circumstances surrounding the crime, the defendant's psychological evaluations, participation in treatment programs, ages of the offender and victim, the offender's prior criminal record, drug history, behavioral characteristics and relationship to the victim. 42 Pa.C.S. § 9794(c).

The trial court then conducts a hearing wherein the offender has the burden to overcome the presumption that he is a sexually violent predator by clear and convincing evidence. The offender is entitled to and is afforded notice prior to the hearing. At the hearing, the offender has the right to have counsel present and to have counsel appointed if needed, as well as the right to present evidence, to call witnesses, to cross-examine the witnesses against him and to present expert testimony. 42 Pa.C.S. § 9794(c).

When evaluating the constitutionality of any statute, there is a strong presumption in the law that legislative enactments do not violate the constitution. *Commonwealth v. Barud,* 545 Pa. 297, 304, 681 A.2d 162, 165 (1996). Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. *Id.* In order to successfully challenge a statute, the challenger must prove that the statute "clearly, palpably and plainly violates the Constitution." *Appeal of Torbik,* 548 Pa. 230, 239, 696 A.2d 1141, 1145 (1997). Any uncertainty must be resolved in favor of the validity of the statute. *Id.* While penal statutes are to be strictly construed, the courts are not required to give the words of a criminal statute their narrowest meaning or disregard the evident legislative intent of the statute. *Barud,* at 304, 681 A.2d at 165. It is with these standards in mind that I find fault with

the majority's conclusion that the provisions of the Act in question are violative of due process. Initially, the Act does not deprive an offender of due process of law by presuming that he is a sexually violent predator following his conviction for a sexually violent offense. A statutory presumption may be sustained if there is a rational relationship between the fact proved and the ultimate fact presumed. *Tot v. United States,* 319 U.S. 463, 467 (1943). "The process of making the determination of rationality is, by its nature, highly empirical." *United States v. Gainey,* 380 U.S. 63, 67 (1965). This Court must give significant weight to the conclusions of the legislature concerning matters that are commonplace or not within specialized judicial competence. *Id.*

Here, the presumption that one who commits a sexually violent crime is a sexually violent predator is a sound presumption supported by rational legislative findings. Section 9791(a)(2) of the Act provides that "sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest." The legislature's determination regarding the risk of recidivism among sexually violent criminals merits our deference under the rational relationship standard.

The presumption that an offender is a sexually violent predator is rebuttable. The Act affords due process to the offender by providing him with an opportunity to be assessed by members of an Assessment Board whose findings are reviewed by the trial court. The offender is afforded a hearing wherein he has the right to counsel, the right to present evidence, to call witnesses, to present expert testimony, to confront and cross-examine the witnesses against him, and to have counsel appointed if he cannot afford private counsel. If the offender rebuts the presumption by clear and convincing evidence, application of the legislatively enacted maximum penalty is avoided.

In determining that the statutorily afforded opportunity to rebut the presumption is constitutionally insufficient, the majority first concludes that the determination of whether an

offender is a sexually violent predator is a separate factual question which commences following a conviction and which subjects the offender to heightened criminal punishment, On this basis, the majority determines that the issue of the constitutionality of the provisions of the Act in question is controlled by *Specht v. Patterson,* 386 U.S. 605 (1967).

In *Specht,* the United States Supreme Court reviewed Colorado's Sex Offenders Act and determined that the Act violated due process. The Sex Offenders Act did not make the commission of a specified crime the basis for sentencing. Rather, it made one conviction the basis for commencing another proceeding wherein the trial court determined whether the defendant, if at large, would constitute a threat of bodily harm to members of the public, or was a habitual offender and mentally ill. If the trial court so determined, the defendant could be sentenced to an indeterminate term of imprisonment ranging from one day to life. The United States Supreme Court reasoned that, because invocation of the Colorado statute caused the initiation of a new charge leading to criminal punishment, the defendant was entitled to due process, which that statute failed to provide.

I believe that *Specht* does not mandate the majority's finding that the Act is violative of due process. The crucial difference between the Act and the Colorado statute is that the Colorado statute failed to provide a defendant with notice and a full hearing before the statute was invoked. The United States Supreme Court stated in *Specht* that "due process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with the witnesses against him, have the right to cross-examine and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." *Specht,* 386 U.S. at 610. Here, the Act affords an offender **every single** protection which the United States Supreme Court mentioned in *Specht.* Under the Act, an offender is provided notice and is entitled to be present, to have counsel, either private or court-appointed, to be heard, to confront the witnesses against him, to cross-examine, and to present his own evidence including expert testimony. The trial court is

required to set forth its determination on the sentencing order for purposes of appeal. 42 Pa.C.S. § 9794(e).

The fact that the Act provides for every protection which the *Specht* Court identified as necessary to satisfy due process renders the majority's conclusion that *Specht* is controlling untenable. The United States Supreme Court struck down the Colorado statute only because it lacked the precise procedural due process safeguards which the Act in question provides to offenders.

The majority's conclusion that a convicted sex offender is entitled to the full panoply of relevant protections with respect to the determination of whether he is a sexually violent predator is equally unsupportable. The majority concludes that, because an offender is already presumed to be a sexually violent predator upon being convicted of a predicate offense, he is afforded no due process regarding this finding. However, under the Act, the presumption that an offender is a sexually violent predator arises only after an offender has been found guilty beyond a reasonable doubt or has entered a knowing and voluntary plea to one of the enumerated predicate offenses. Thus, the convicted offender to whom the presumption applies has forfeited certain legal rights which would be maintained by a defendant not yet convicted. Once the presumption of innocence has been overcome, the constitutional requirements relative to due process are of a lesser standard. *See Commonwealth v. Wright,* 508 Pa. 25, 39, 494 A.2d 354, 361 (1985), *aff'd sub nom. McMillan v. Pennsylvania,* 477 U.S. 79 (1986) (once convicted, a defendant's right to remain free from incarceration has been extinguished, and he is subject to punishment).

While it is unquestionable that an offender subject to the Act is entitled to due process of law, due process is a flexible concept. The United States Supreme Court has stated:

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been

> determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

In the instant matter, a jury convicted appellee of numerous predicate offenses stemming from acts he committed against a nine-year old boy. Thus, "unlike cases in which a fundamental liberty interest is at stake, . . . the defendant's fundamental right, i.e., freedom from confinement, has already been forfeited." *Wright,* at 41, 494 A.2d at 362. Accordingly, while appellee was entitled to due process with respect to the determination of whether he was a sexually violent predator, by providing notice and by affording him the right to counsel, the right to be present, to present evidence including expert testimony, to confront the witnesses against him and to cross-examine witnesses, the Act provided appellee with sufficient due process.

The majority further determines that the provision of the Act which places the burden upon the defendant to prove by clear and convincing evidence that he is not a sexually violent predator violates the Due Process Clause of the Fourteenth Amendment. The Due Process Clause prevents a court from giving the Commonwealth the benefit of a presumption which would have the effect of relieving the Commonwealth of its burden of proving every element of a crime beyond a reasonable doubt. *See Walton v. Arizona,* 497 U.S. 639, 650 (1990) (plurality decision recognizing that the constitution is not violated by placing the burden upon a defendant to prove mitigating circumstances sufficiently substantial to call for leniency, so long as a state's method of allocating the burden of proof does not lessen the state's burden to prove every element of the offense charged). Under the Act, the Commonwealth has already met its burden of persuasion in securing the conviction on which the offender's status is based. Thus, the defendant's status as a sexually violent predator is not an element of the crime, but is instead a sentencing consideration.

The majority reasons that the determination of whether an offender is a sexually violent predator is a separate factual question following conviction and, therefore, the burden should be on the Commonwealth to establish that an offender is a sexually violent predator beyond a reasonable doubt. However, the Act does not create a separate criminal offense. Rather, the Act merely instructs the trial court how an offender who has committed a predicate criminal act is to be sentenced. I agree that, insofar as the Act prescribes the sentencing options facing offenders, it does establish punishment. *See* 42 Pa.C.S. § 9799(a) & (c). However, it is the province of the legislature to determine the punishment imposable for criminal conduct. *Wright,* at 40, 494 A.2d at 361. The legislature has the right to fix the maximum penalty, and likewise, can if it sees fit, name the minimum. *Commonwealth v. Glover,* 397 Pa. 543, 544, 156 A.2d 114, 116 (1959). Here, the legislature could have acted within its authority and simply increased the maximum penalty for the predicate crimes. Instead the legislature drafted a detailed statute which affords a convicted criminal sex offender an opportunity to avoid the maximum penalty of life imprisonment.

With respect to placing the burden on the defendant to prove that he is not a sexually violent predator, the Act is not unlike other sentencing statutes which place the burden upon defendants to present factors to mitigate their sentences, a process which this Court has found to be constitutional. *See Commonwealth v. Zettlemoyer,* 500 Pa. 16, 66, 454 A.2d 937, 963 (1982), *cert. denied,* 461 U.S. 970 (1983), *rehearing denied,* 463 U.S. 1236 (1983) (capital sentencing scheme which requires the accused to prove, by a preponderance of the evidence, any mitigating circumstances that might convince a jury that the sentence should nevertheless be set at life imprisonment, is not offensive to due process).

In the Act, the legislature has taken one factor that has always been relevant when sentencing, the risk that an individual poses to society, and has legislated the consequence if the trial court determines that an offender poses such a risk. In this regard, the Act is similar to the sentencing provisions which this Court upheld in *Wright.* In *Wright* this Court

upheld the portion of the Mandatory Minimum Sentencing Act, 42 Pa.C.S. § 9712 ("Sentencing Act') which mandated the imposition of a five-year minimum sentence when the preponderance of the evidence demonstrated that a defendant was in visible possession of a firearm during the commission of certain felonies. The appellants in *Wright* argued that visible possession of a firearm was an element of the crimes for which they were being sentenced and, therefore, the Commonwealth should have been required to prove the possession beyond a reasonable doubt.

In rejecting the claim that the Sentencing Act effectively made visible possession of a firearm a separate element of the underlying felonies, this Court cited *Patterson v. New York,* 432 U.S. 197 (1977), where the United States Supreme Court held that the reasonable doubt standard had always been dependent upon how a state defines the offense.[5] *Wright,* at 34, 494 A.2d at 358. This Court noted in *Wright* that, in enacting the Sentencing Act, the legislature specifically stated that visible possession "shall not be an element of the crime." *Id.* at 29, 494 A.2d at 356 (quoting 42 Pa.C.S. § 9712 (b)). This Court further noted that the mandatory minimum sentence did not come into play until after a defendant had been convicted of an enumerated felony. "In making visible possession of a firearm a sentencing factor to be considered only after conviction of specified offenses, the legislature has in no way relieved the prosecution of its burden of proving guilt." *Id.* at 35, 494 A.2d at 359.

The United States Supreme Court affirmed this Court's holding in *Wright. See McMillan v. Pennsylvania,* 477 U.S. 79 (1986). Like this Court, the United States Supreme Court cited its decision in *Patterson v. New York* for the proposition that the state need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or punishment." *Id.* at 84

5. In *Patterson,* the United States Supreme Court held that a New York law which placed the burden on murder defendants to prove the affirmative defense of extreme emotional disturbance did not violate due process.

(quoting *Patterson,* at 207). In *McMillan,* the United States Supreme Court agreed with this Court that, because visible possession of a firearm was not an element of the underlying felony, but instead was a sentencing provision that came into play only after the defendant had been found guilty, the Commonwealth did not have to prove visible possession beyond a reasonable doubt.

I do not find the majority's attempts to distinguish the instant matter from *Wright* and *McMillan* persuasive.[6] The majority reasons that, unlike in *Wright,* where a defendant found to be in visible possession of a firearm was required to be sentenced to a minimum of five years, a sentence encompassed within the purview of the sentencing guidelines for the crimes charged, here, an offender is subjected to heightened criminal punishment because the Act expands the maximum sentence to be imposed for the predicate crimes to life imprisonment if the offender is found to be a sexually violent predator. This argument fails simply because, as discussed *supra,* it is the province of the legislature to determine the boundaries of the punishment imposable for criminal conduct. Further, the United States Supreme Court, in dicta in *McMillan* stated that, if a finding of visible possession had, in fact, exposed defendants to greater or additional criminal punishment, this fact would have given the arguments raised by the defendants in *McMillan* "superficial" appeal. *McMillan* at 88. The fact that the Sentencing Act in question in *Wright* and *McMillan* did not create any presumptions is of no moment because, as discussed *supra,* the presumption created by the Act is reasonable.

Finally, I disagree with the majority's conclusion that, even if this Court were to view the post-conviction proceeding set forth in the Act to be a mere sentencing provision, the Act would still not be constitutionally deficient. The majority reasons that the risk of error in the assessment of whether an

6. One way in which the majority attempts to distinguish *Wright* from the instant matter is by concluding that the issue of whether an offender is a sexually violent predator is a separate element of the crime. I believe that this argument fails because as discussed *supra* at pp. 10-11, the Act is a mere sentencing scheme and does not create a new offense.

offender is a sexually violent predator is great and involves a subjective determination by the trial court. The majority then compares this determination to the question present in *Wright/McMillan,* whether one was in visible possession of a firearm; which the majority deems an objective determination where the risk of error was slight.

In support of the proposition that placing the burden on the offender makes a Megan's Law hearing more unreliable than if the burden of persuasion rested with the Commonwealth, the majority cites the Third Circuit Court of Appeals' decision in *E.B. v. Verniero,* 119 F.3d 1077 (1997), *cert. denied,* 118 S. Ct. 1039 (1998). In *E.B. v. Verniero,* the Third Circuit held that New Jersey's version of Megan's Law violated procedural due process by placing the burden on the defendant at a Megan's Law hearing to establish by a preponderance of the evidence that his classification was in error. I do not find *E.B. v. Verniero* persuasive due to the significant differences between Pennsylvania's and New Jersey's versions of Megan's Law.

Under the New Jersey statute, the risk of re-offense is assessed by *prosecutors.* The prosecutors utilize extensive guidelines in order to classify offenders under a three tier system, with the first tier representing a low risk of recidivism and the third tier representing a high risk of recidivism. The extent of public notification is linked to the risk of re-offense.[7] If an offender opts to challenge his classification, he is limited to presenting the issues of whether the Registrant Risk Assessment Scale[8] has been accurately applied and whether there is something extraordinary about his particular case that takes it out of the "heartland" of cases within the scope of the

7. Under the New Jersey statute, only law enforcement officials are notified of the whereabouts of an offender who has been classified in the first tier. If an offender is classified in the second or third tier, more extensive public notification is required. *See E.B. v. Verniero* at 1082-87 (describing in detail the notification and registration requirements of the New Jersey statute).

8. The scale is a numerical scoring system designed with the assistance of mental health and law enforcement professionals to evaluate the degree of risk of the sex offender. *E.B. v. Verniero,* at 1083-84.

tier that would have otherwise been indicated. *Id.* at 1108.[9] In determining that the New Jersey statute violated procedural due process, the *E.B. v. Vernerio* court seemed particularly concerned over the role that the prosecutors played in weighing such factors as the offender's physical and mental condition, whether the offender had received counseling or treatment or was under supervision, and the offender's criminal history. *See E.B. v. Vernerio* at 1107-1110.

The *E.B. v. Vernerio* court determined that resolution of the issue of whether the scale had been accurately applied required fact-finding which posed more than a normal risk of error because it involved a subjective determination by the court regarding the degree and nature of the risk posed by the particular registrant. *Id.* at 1108. The court stated: "Thus, in resolving these issues, the court is necessarily required to assess future dangerousness. While the state is clearly entitled to require a court to undertake such an assessment, it is an undertaking involving substantial uncertainty." *Id.*

There is much less uncertainty surrounding a Megan's Law hearing under the Pennsylvania statute. The risk of re-offense is not assessed by prosecutors. Rather, the legislature has already determined that there is a great likelihood that one convicted of a violent sexual offense will offend again. "(I]n matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U.S. 63, 67 (1965). After a person is convicted of a predicate offense, an *independent* review board conducts an assessment of the offender and issues a report to the court. The Assessment Board is comprised of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3(a). The Assessment Board considers factors

9. The *E.B. v. Vemiero* court further noted that if an offender challenged not just the tier classification but also the reasonableness of the prosecutor's notification plan, the court must also exercise a judgment about whether the scope of the proposed notification is appropriate to the risk presented by the particular registrant.

similar to those considered in any pre-sentence report. *See* 42 Pa.C.S. 9794(c). After receiving the Assessment Board's report, the court holds a full and complete hearing in order to determine whether the offender is a sexually violent predator.

Unlike the New Jersey statute, the Act links the determination of whether one is a sexually violent predator not only to registration and notification, but also to the offender's maximum sentence. Accordingly, the offender is not only entitled to, but has a significant incentive to present as much mitigation evidence as possible to the trial court, thereby reducing the risk of error in the fact-finding process. A certain degree of risk is always present in any sentencing proceeding. However, a defendant's liberty interest is no more threatened by the Act's provisions than it is by any other mandatory incarceration provision. As *Wright* makes clear, although sentencing proceedings must comport with due process, the convicted defendant need not be accorded "the entire panoply of criminal trial procedural rights." *Wright* at 36, 494 A.2d at 360 (quoting *Gardner v. Florida,* 430 U.S. 349, 358 n. 9 (1977)).

When evaluating the specific dictates required by the Fourteenth Amendment, this Court must consider: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and (3) the value of the government's interest, including the function involved and the burdens that an additional or substitute procedural requirement would entail. *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976). Here, the majority correctly notes that the state has a compelling interest in protecting its citizens by providing prompt information to potential victims concerning sexually violent predators. I further agree that a defendant has a private interest in avoiding the mandatory maximum life sentence applicable to sexually violent predators.

However, before an offender can invoke a due process claim for a violation of his liberty interests, there must be a protectable interest. As discussed *supra,* a defendant's fundamental right to be free from confinement has already been forfeited by the fact of his conviction for the predicate offense. Thus, the government's interest in the safety and welfare of

children and other potential victims far outweighs an offender's reduced liberty interest in avoiding a mere enhancement to a prescribed prison sentence. Preventing danger to the community is a legitimate regulatory goal, and the government's regulatory interest in community safety can often outweigh an individual's liberty interest. *United States v. Salerno*, 481 U.S. 739, 748 (1987) (holding that the Bail Reform Act of 1984 was not unconstitutional and that the Act's presumption that individuals arrested for certain serious offenses are far more likely to be responsible for dangerous acts in the community after arrest was not irrational or arbitrary). Further, an offender's reputation and personal life pales in comparison to the government's interest in the protection of the public from the high risk posed by sexually violent predators.

Thus, I see no constitutional violation in placing the burden of persuasion on the offender, since it is he who often times is the only person in possession of the information needed to rebut the presumption. Accordingly, I believe that while an offender is entitled to due process, the Act provides all the process that is due.[10] For the aforementioned reasons, I dissent.

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10. In my opinion, the Act is actually a defendant *friendly* enactment. Instead of providing an offender with the opportunity to avoid a life sentence as it has done in the Act, the legislature could have merely increased the maximum penalties for the predicate offenses to life imprisonment.

APPENDIX B - OPINION OF THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA DATED SEPTEMBER 23, 1997

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

NO. 922 OF 1997

COMMONWEALTH OF PENNSYLVANIA

v.

DONALD FRANCIS WILLIAMS

OPINION AND ORDER

I. BACKGROUND OF THE CASE

On February 26, 1997, the Defendant was arrested and charged with numerous sexual offenses. On May 23, 1997, a Criminal Information was filed in this case charging the Defendant with two (2) counts of involuntary deviate sexual intercourse, [18 Pa. Cons. Stat. Ann. § 3123(a)(6)], two (2) counts of indecent assault, [18 Pa. Cons. Stat. Ann. § 3126 (a)(7)] and one (1) count of corruption of minors [18 Pa. Cons. Stat. Ann. § 6301(a)]. It was alleged that the Defendant committed fellatio upon the nine (9) year old male victim during the period May 19, 1996 through December 23, 1996, as well as December 24, 1996 to December 31, 1996.

On July 15, 1997, the Defendant was found guilty as charged by a jury. Immediately after the verdict, this Court ordered an evaluation of the Defendant pursuant to 42 Pa. Cons. Stat. Ann. § 9791 et seq. ("Megan's Law"). Defendant's counsel filed a pervasive challenge to the statute and the Commonwealth filed a response. Argument on the matter was conducted on August 29, 1997.

II. DISCUSSION

Pennsylvania's version of Megan's Law became effective in the Commonwealth of Pennsylvania in April, 1996. The legislative purpose of the statute is set forth at § 9791 in the following manner:

> . . . To protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

42 Pa. Cons. Stat. Ann. § 9791(b).

The law has a number of components. It provides for the registration of certain offenders for a period of ten (10) years.[1] 42 Pa. Cons. Stat. Ann. § 9793. Defendants required to register are those who

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[1] Section 9793 requires a person convicted of a sexually violent offense to register a current address with the Pennsylvania State Police upon release or parole and to further inform them if s/he should ever change residences.

have been found guilty[2] of certain predicate sexual offenses involving a minor victim [§ 9793(b)(1)] or other victims regardless of age [§ 9793(b)(2)]. These include, but are not limited to, kidnaping, rape, involuntary deviate sexual intercourse, aggravated indecent assault, certain prostitution and related offenses and certain offenses relating to obscene and other sexual materials and performances. 42 Pa. Cons. Stat. Ann. § 9793(b). The registration requirements (in contrast to notification requirements) apply to any individual who commits one of the predicate offenses. Failure to register can result in conviction of a felony of the third degree. 42 Pa. Cons. Stat. Ann. § 9793(e).

The statute also provides for a designation of "sexually violent predators." The term sexually violent predator is defined as :

> A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

42 Pa. Cons. Stat. Ann. § 9792.

The statute establishes an assessment procedure before the State Board To Assess Sexually Violent Predators ("Board") after finding of guilt but before sentencing to determine whether or not the

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[2] Pleas of guilty and nolo contendere are included.

defendant is a sexually violent predator. 42 Pa. Cons. Stat. Ann. § 9794. Once the Board completes the assessment, its members submit a written report to the sentencing court. The court then must determine whether or not the offender is a sexually violent predator. This requires an evidentiary hearing held by the trial judge prior to sentencing. The offender and the district attorney are provided notice of the hearing, an opportunity to be heard, the right to call witnesses, including experts, and the right to cross-examine witnesses. Furthermore, the offender has a right to counsel and to appointed counsel if indigent. 42 Pa. Cons. Stat. Ann. § 9794(e).

Of critical significance is § 9794(b) which provides:

> (b) **Presumption.** - An offender convicted of any offense set forth in section 9793(b) shall be presumed by the Board and the Court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa. Cons. Stat. Ann. § 9794(b) (emphasis added).

Moreover, the offender is subjected to enhanced penalties specified in § 9799.4. These include a maximum sentence of life imprisonment [§ 9799.4(a)] and a mandatory minimum sentence of life imprisonment for repeat offenders [§ 9799.4(c)]. The offender is further affected by the notification provision of §§ 9795-9798.

In order to avoid these consequences, the defendant must prove by clear and convincing evidence that s/he is not a sexually violent predator.

Initially, this Court recognizes certain fundamental principles of constitutional law. First, there is a strong presumption in the law that legislative enactments do not violate the Constitution. Commonwealth v. Barud, 545 Pa. 297, 681 A.2d 162, 165 (1996) (citations omitted). Second, there is a heavy burden of persuasion upon the one who challenges the constitutionality of a statute. Id. In order to prevail, the challenger must prove that the statute palpably and plainly violates the Constitution, and any uncertainty must be resolved in favor of the statute's validity. Appeal of Torbik, __ Pa. __, 696 A.2d 1141, 1145 (1997). Third the provisions of the statute are severable. 1 Pa. Cons. Stat. Ann. § 1925.

With these general principles in mind, this Court will address the Defendant's challenges to Pennsylvania's Megan's Law which are ripe for disposition.

A. IS THE STATUTE VAGUE?

The Defendant argues that the statutory definition of sexually violent predator is vague because the terms "personality disorder," "mental abnormality," and "menace" are broad and undefined.[3]

A statute is void for vagueness if persons of ordinary intelligence must guess at its meaning and then differ as to its application such that one does not have notice of what conduct is forbidden by the statute. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938); Commonwealth v. Barud, 545 Pa. 297, 681 A.2d 162, 165 (1996). Stated in the converse, a statute which provides reasonable standards by which a person may gauge his future conduct is not void

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[3] It is of note that the terms "sexually violent predator" and "mental abnormality" are specifically defined in Megan's Law, while "personality disorder" and "menace" are not. However, the latter two terms are contained within the definitions of the former two terms. See 42 Pa. Cons. Stat. Ann. § 9792.

for vagueness. Barud, 681 A.2d at 165.

In Kansas v. Hendricks, 117 S.Ct. 2073 (1997),[4] the United States Supreme Court held that the definition of "mental abnormality" in the Kansas Act providing for civil commitment of sexually violent predators satisfied substantive due process. The Supreme Court has recognized repeatedly the uncertainty of diagnosis regarding mental disease. Jones v. United States, 463 U.S. 354, 365, n. 13 (1983). This, however, does not tie the states' hands but rather affords them the widest latitude in drafting statutes in this area. Hendricks, 117 S.Ct. at 2081, n.3. Furthermore, "when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." Id. (internal quotation marks and citation omitted).

Accordingly, the definitions provided by the Pennsylvania Legislature in Megan's Law are not broad and undefined as they sufficiently place persons on notice of what types of behavior are prohibited. Therefore, Megan's Law is not void for vagueness.

B. DOES THE ASSESSMENT PROCEDURE VIOLATE THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION?

The Defendant asserts that the assessment and adjudication procedures of Megan's Law violate his right against self-incrimination under the United States and Pennsylvania Constitutions by forcing him to make statements during a psychological evaluation that can be used

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[4]Although Hendricks involves substantive due process in the civil commitment context, this Court finds its teachings applicable to the vagueness issue presented here. Notably, the Pennsylvania definition tracks that of the Kansas statute almost identically. Compare 42 Pa. Cons. Stat. Ann. § 9792 with Kan. Stat. Ann. § 59-29a02(b).

against him in order to prove that he is a sexually violent predator.

This Court finds that the current situation is analogous to the sentencing context. Pennsylvania Rule of Criminal Procedure 1403 provides for aids in imposing sentences, including court orders for psychiatric examinations. Megan's Law clearly applies after a finding of guilt and in anticipation of sentencing.

A sentencing judge may conduct a broad inquiry with regard to the kind and source of information he may consider. Roberts v. United States, 445 U.S. 552, 556 (1980). The Pennsylvania Supreme Court has stated that the sentencing phase of a trial has a different purpose than the guilt phase such that "the privilege against self-incrimination in its pure form has no direct application to a determination of the proper sentence to be imposed." Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288, 300 (1983), *cert. denied*, 467 U.S. 1256 (1984), *reh'g denied*, 468 U.S. 1226 (1984). Id.

Rule 1403(B) of the Pennsylvania Rules of Criminal Procedure provides:

> After a finding of guilt and before the imposition of sentence, after notice to counsel for both parties, the sentencing judge may, as provided by law, order the defendant to undergo a psychiatric or psychological examination.

The court may then use the results of the examination to aid in determining the proper sentence for the defendant. Similarly, § 9794(a) of Megan's Law provides:

> After conviction, but before sentencing, a court shall order a person convicted of a sexually

> violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the board.

In substance, this section is no different than Pa.R.Crim.P. 1403. Both sections provide for psychiatric/psychological evaluation before sentencing. The purpose of both provisions is to determine the appropriate sentence for a person who has already been found guilty of a crime. Therefore, the Defendant's right against self-incrimination is not implicated. Consequently, it is not a violation of the Defendant's right against self-incrimination to be subject to an assessment under § 9794 of Megan's Law.

C. DOES THE ASSESSMENT PROCEDURE VIOLATE THE DEFENDANT'S RIGHT TO COUNSEL?

The Defendant claims that the assessment procedure violates his right to counsel under the United States and the Pennsylvania Constitutions by denying counsel at a critical stage of a criminal proceeding.

Again, this Court finds his situation no different than that of other defendants awaiting sentencing. Pennsylvania Rule of Criminal Procedure 1403 allows a judge, in his/her discretion, to order a pre-sentence investigation report containing information regarding the circumstances of the offense and the defendant's character to assist the judge in determining the appropriate sentence.

A defendant is entitled to counsel at all critical stages of the criminal process. See generally, Commonwealth v. Karash, 513 Pa. 6, 518 A.2d 537, 541 (1986) citing e.g., Coleman v.

Alabama, 399 U.S. 1, (1970). In analyzing a right to counsel claim in the sentencing context, the Pennsylvania Supreme Court stated that a critical stage of a criminal proceeding is a "situation where legal rights may be preserved or lost, or where some factual or legal disadvantage may be suffered by the accused." Commonwealth v. Burton, 451 Pa. 12, 14, 301 A.2d 675, 676 (1973) (citation omitted). The Burton court further stated that "[t]he pre-sentence investigation is not a situation where legal rights must be preserved or lost." Id. Accordingly, this Court finds that the Assessment stage is not critical, and therefore, the Defendant's right to counsel is not implicated.

D. IS THE STATUTE A BILL OF ATTAINDER?

The Defendant claims that Megan's Law is a bill of attainder in violation of the United States and Pennsylvania Constitutions because the presumption of guilt standard in § 9794 imposes punishment upon defendants who are easily ascertainable members of a disfavored group.

A bill of attainder is "a legislative enactment which determines guilt and inflicts punishment upon an identifiable person or group without a judicial trial." Commonwealth v. Scheinert, 359 Pa. Super. 423, 429, 519 A.2d 422, 425 (1986), *appeal denied*, 517 Pa. 606, 536 A.2d 1330 (1987) (citing Nixon v. Administrator of General Services, 433 U.S. 425, 468, 97 S.Ct. 2777, 2803 (1977)). Megan's law does not apply until a person has been found guilty of a designated sexually violent offense after a judicial trial. Therefore, the Defendant's claim is without merit.

E. DOES THE STATUTE VIOLATE THE DEFENDANT'S RIGHT TO PRIVACY?

To the extent that the Defendant raises a privacy claim under various federal and state constitutional provisions, this Court concludes that his argument does not entitle him to relief. In

> of the fact of his arrest on the shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713.

In the absence of any Pennsylvania precedent, this Court has relied upon - to some extent - the Third Circuit Court of Appeals recent decision in E.B. v. Verniero, No. 96-5132, slip op. (3d Cir. Aug. 20, 1997),[5]

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[5] The New Jersey statute is the predecessor to not only Pennsylvania's version, but to many other similar statutes found throughout the United States. It was enacted as a reaction to the brutal rape and murder of seven (7) year old Megan Kanka on July 29, 1994. It establishes both a registration requirement and a three-tiered notification program. Artway v. Attorney General, 81 F.3d 1235, 1243 (3d Cir. 1996). In substance, the registration and notification requirements are quite similar to those found in the Pennsylvania version. Unlike Pennsylvania's statute, however, in order to determine how New Jersey officials will use the registration information, there is a determination made by the state (district attorney) as to whether the sex offender poses a low (Tier 1), moderate (Tier 2), or high (Tier 3) reoffense risk. N.J. Stat. Ann. § 2C: 7-8c. Every registrant qualifies for Tier 1 treatment,

which discusses this and other issues related to this case in the context of New Jersey's Megan's Law (N.J. Stat. Ann. § 2C:7-1 et seq.). The Third Circuit Court of Appeals in E.B., applied this rationale to the notification requirements of New Jersey's Megan's Law found in Tiers 2 and 3. Recognizing that the indirect effects experienced by a registrant in those situations were "more profound" than those in Davis, it held that:

> It follows that, just as the officers' publication of the official act of Davis' arrest did not violate any fundamental privacy right of Davis', neither does New Jersey's publication (through notification) of registrants' convictions and findings of dangerousness implicate any interest of fundamental constitutional magnitude. The reputational interests asserted by appellants are "very different" from matters relating to marriage, procreation and child rearing, and are therefore "far afield" from what has been deemed "fundamental" by the

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designation. In Artway, supra, the Third Circuit Court of Appeals sustained the constitutionality of the provisions of Megan's Law requiring registration and tier 1 notification. It declined to address, however, the accompanying constitutional challenge to the provisions requiring the broader notification authorized for tier 2 and tier 3 classifications. 81 F.3d at 1250. However, in E.B., the Third Circuit addressed additional issues including those which this Court finds applicable to the instant case. E.B., at p. 60.

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> has been deemed "fundamental" by the Constitution.

Id. at 50. Therefore, this Court, following Davis and E.B., finds that the Defendant Williams has not asserted a privacy interest of fundamental constitutional magnitude.

In further support of its conclusion, this Court notes that although the notification provisions of the Pennsylvania statute are more pervasive than the normal recordation of criminal conviction information, a criminal defendant's fact of conviction is routinely a matter of public record in this Commonwealth. That information is available, albeit on a limited basis, pursuant to the provisions of the Criminal History Record Information Act [18 Pa. Cons. Stat. Ann. § 9101 et seq.].

Even if one assumes a privacy interest of fundamental magnitude, when that interest is balanced against the state's interest in protecting the public relative to convicted sex offenders who may pose a danger of recidivism, this Court agrees with the following rationale of the Third Circuit Court of Appeals:

> We believe the state's interest in protecting the public here is similar to, and as compelling as, the state interest served by the Civil Commitment Statute in Hendricks. Accordingly, based on Hendricks, we believe that the state's interest here would suffice to justify the deprivation even if a fundamental right of the registrant's were implicated. Given that something less than a fundamental interest is implicated, the impact of Megan's

> Law on the registrants' reputational interests is necessarily insufficient alone to constitute "punishment."

Id. at 51.[6]

This Court finds that Pennsylvania's Constitutional requirements in this regard parallel those of the Federal Constitution. As the Pennsylvania Supreme Court has stated:

> The right of privacy of each individual is protected by the Constitutions of the United States and by this Commonwealth. (citations omitted). Of course, an individual's right to privacy is not obsolete; however, where a person asserts a legitimate expectation of privacy, that expectation of privacy cannot be violated without a judicial balancing of respective interests in a judicial determination that the government or other private party has compelling needs and interests which justify the invasion of privacy.

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[6] In Hendricks, supra, the United States Supreme Court upheld a Kansas statute that provides for the civil commitment of "sexually violent predators". That statute (Kan. Stat. Ann.§59-29a 01 et seq.) allows the state of Kansas to confine an individual convicted or charged with a violent sexual offense and suffering from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence to be committed for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.

John M. v. Paula T., 524 Pa. 306, 571 A.2d 1380, 1385 (1990) (citation omitted), *cert denied*, 498 U.S. 850 (1990).

Therefore, this Court concludes that the statute does not violate the privacy protections of either the United States or Pennsylvania Constitutions.

F. DOES THE STATUTE VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS?

1. THE OBJECT OF THE STATUTE

In order to address the Defendant's due process challenges, it is necessary to determine the object of Pennsylvania's Megan's law, i.e., whether it is remedial or punitive. Although there is a persuasive argument that the registration and notification provisions (§§ 9793 and 9795-9798) are remedial in nature,[7] the same cannot be said of § 9799.4. Moreover, if the law cannot be explained solely by a remedial purpose, then it is punitive. Cf. United States v. Halper, 490 U.S. 435, 448 (1988). After its review, this Court concludes that given the severity of the sanctions found in § 9799.4, the statute cannot be said to be solely remedial. It necessarily follows that the statute must be punitive.[8]

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[7] Contrast the case of E.B.. The New Jersey version of Megan's Law does not, unlike its Pennsylvania counterpart, enhance the punishment of offenders.

[8] This Court also acknowledges the test that the Third Circuit established in Artway, supra, n. 5, for determining whether a statute is remedial or punitive. However, given the punitive extent of Pennsylvania's Megan's Law, particularly the enhanced sentencing provision, this Court finds a protracted discussion of the issue unnecessary.

2. THE PRESUMPTION AND HEARING PROCEDURE

A troubling issue for this Court involves the presumption and procedure established by §§ 9793 and 9794 respectively. As noted earlier, an offender convicted of any of the predicate offenses set forth in § 9793(b) is presumed to be a sexually violent predator. This presumption may only be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with § 9794(e). At this stage of the case, the Commonwealth has no burden whatsoever.

Failure to rebut the presumption subjects the defendant to the additional notification requirements of § 9798, a mandatory maximum sentence of life imprisonment [§ 9799.4(a)], and a mandatory minimum life sentence if this is the defendant's subsequent sexually violent offense. § 9799.4(c)(4).

In analyzing the due process aspects of the presumption and the hearing procedure, this Court finds the following. First, there is a potential deprivation of a liberty interest which is prohibited by the Fourteenth Amendment of the United States Constitution if adequate procedural due process procedures are not afforded the defendant. The enhanced sentencing and the mandatory sentencing provisions make this abundantly clear. Sandin v. Conner, 115 S.Ct. 2293, 2300 (1995).

Second, this Court must analyze the presumption, burden of proof, and evidentiary standard to determine if they meet constitutional muster. In Matthew v. Eldridge, 424 U.S. 319 (1976), the Supreme Court of the United States stated:

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . . . More

> precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 344-345 cited in E.B., at 57 (internal quotations and citations omitted).

In Santosky v. Kramer, 455 U.S. 745 (1982), the United States Supreme Court addressed due process requirements in a termination of parental rights proceeding. In Addington v. Texas, 441 U.S. 418 (1979), the United States Supreme Court addressed the state's burden in a civil commitment proceeding. The Supreme Court in Santosky (as it did in Addington) identified the private and public interests at stake and evaluated the relative risk of error in the particular kinds of proceedings involved in order to determine whether the evidentiary standard employed "fairly allocate[d] the risk of an erroneous factfinding between [the parties]." Santosky, 455 U.S. at 761. In other words, due process requirements in this context reflect an evaluation of the weight of

the public and private interests, as well as the societal judgment about how the risk of error should be distributed between the litigants. Id. at 755. The Supreme Court in Santosky and Addington held that the state carried the burden by more than a preponderance of the evidence and concluded that it was a clear and convincing standard. An important consideration for the Court was that:

> Neither a person threatened with a termination of parental rights nor one standing in jeopardy of a civil commitment "should . . . be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."

E.B, supra. at 58 (citing Addington v. Texas, 441 U.S. at 427).

The same principles apply in assessing the Defendant's claim under the Pennsylvania Constitution. Commonwealth v. McMillan, 508 Pa. 25, 494 A.2d 354, 358-362 (1985), *aff'd*, 477 U.S. 79 (1986).

This Court must determine, as did the Third Circuit Court of Appeals in E.B., whether the due process protections found in the federal constitution (First and Fourteenth Amendments) as well as our state constitution (Article 1 § 9) permit Pennsylvania to allocate the burden of proof to the Defendant under Megan's Law.

The private interests involved in the notification provisions of the Pennsylvania Statute, like New Jersey's, are very substantial. E.B. at 60. This Court cannot state the proposition any more articulately than did the Third Circuit Court of Appeals

when it said:

> Notification puts the registrant's livelihood, domestic tranquility, and personal relationships with all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least fifteen (15) years.

Id.[9]

It follows that a defendant convicted under the Pennsylvania statute has a "compelling interest in an accurate and reasonable disposition of the issues before the court in a Megan's Law hearing." Id. This is so because, in effect, the individual may be labeled (even if the label is justified), a pariah with whom few, if any citizens will be willing to associate.

Balanced against that interest is that of Pennsylvania. This Commonwealth has a compelling interest in protecting its citizens by giving prompt notification to potential victims and relevant caregivers with respect to those individuals who are designated as sexually violent predators. "[T]he state also has a compelling interest in ensuring that its classification and notification system is both fair and accurate." Id. However, this Court finds that when it weighs the respective interests in light of the consequences of the risk of error, the federal and state constitutions require that the burden of proof must be upon the Commonwealth to minimize that risk. Id. at 60-61. In so doing, the Commonwealth's ability to secure a fair, accurate and prompt

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[9] Pennsylvania's Megan's Law affects the defendant for ten (10) years or for life.

determination is not impaired and no new administrative burdens are imposed. Id.

Continuing, as this Court previously noted, unlike the New Jersey statute, Pennsylvania's Megan's Law contains a sentencing enhancement provision. In analogous sentencing contexts, it has been held that the burden is upon the state by a preponderance of the evidence. See, McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986). By shifting the burden of proof to the defendant such that s/he is presumed to be a sexually violent predator and by placing the burden of rebuttal of that presumption on the defendant, Megan's Law violates the Fifth and Fourteenth Amendments to the United States Constitution and Section Nine of Article One of the Pennsylvania Constitution.[10] Therefore, this Court is constitutionally precluded from conducting a hearing pursuant to § 9794(e). It may, however, proceed to sentencing applying the sentencing guidelines and statutory provisions of the sentencing code relative to the Defendant's case.[11]

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[10] It would appear that Pennsylvania's statute creates an evidentiary dilemma insofar as the burden of proof relative to the determination of who is a sexually violent predator is arguably one of clear and convincing evidence, while the evidentiary standard for the mandatory minimum sentence provision may be by a preponderance of the evidence. This Court suggests that the dilemma can only be resolved in constitutional terms by eliminating the presumption and by placing the burden of proof upon the Commonwealth by clear and convincing evidence. However, it is not within this Court's authority to rewrite the statute. That is the legislature's prerogative.

[11] The effect of this Court's decision is to leave intact, for all intent and purposes, only the registration, purpose, definitions and some administrative provisions of Megan's Law; but render unconstitutional the others addressed. With respect to the

III. CONCLUSION

In this Opinion and Order, this Court has attempted to balance the relevant constitutional interests in its assessment of Pennsylvania's Megan's Law. Although it has no Pennsylvania precedent upon which to rely, it has found persuasive the rationale of the Third Circuit Court of Appeals in the case of E.B. v. Verniero, supra, which addresses challenges to New Jersey's Megan's Law.

The legislature of this Commonwealth in enacting Megan's Law was well-intentioned. The Commonwealth has a compelling interest in protecting its citizens, especially its children, from those individuals who are likely to sexually prey upon them. In effectuating that interest however, the Commonwealth must insure the minimum standards of constitutional protection for all of its citizens. Stated another way, although a state has a compelling interest in protecting its citizens in the context of these and other criminal cases, it must insure that before labeling a citizen with the brand "sexually violent predator" - a brand that the citizen may well carry for the rest of his/her life - it establishes due process procedures that, to the extent possible, minimize the risk of error. This can only be accomplished by providing a defendant with a full and fair hearing where the Commonwealth bears the burden of proof.

It would be quite easy for a community to "let down" its constitutional guard in cases such as this that involve acts which are so heinous and repugnant to all of us. However, if the provisions of our Federal and Pennsylvania Constitutions have any

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assessment process, although portions may survive, its application is precluded due to the constitutional defects in the statute. Finally, in light of this Court's holding, it need not address Defendant's other arguments.

meaning at all, it is that a government - especially the courts - in a free society rigidly adhere to the requirements of due process in every criminal case. Our Constitutions demand nothing less.

Dated: September 23 , 1997 BY THE COURT:

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Ernest J. DiSantis, Jr., Judge

ORDER

AND NOW, this 23rd day of September, 1997, after having considered the defendant's Motion For Extraordinary Relief challenging the constitutionality of the "Sexually Violent Predator" provisions of Pennsylvania's Megan's Law, etc., Commonwealth's response and the arguments of counsel, it is hereby **ORDERED** that the Motion For Extraordinary Relief is **GRANTED** in part as set forth in the Court's accompanying Opinion. The defendant's ***sentencing*** shall be scheduled for ***October 8, 1997, at 9:30 a.m.***

BY THE COURT:

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Ernest J. DiSantis, Jr., Judge

Marshall J. Piccinini, Esquire
Assistant District Attorney

Keith Clelland, Esquire
Attorney for Defendant

Peter Freed
Deputy Court Administrator

APPENDIX C – RELEVANT PENNSYLVANIA STATUTORY PROVISIONS IN QUESTION

(42 Pa.C.S. §9791-9799.6)

§ 9791. Legislative finding and declaration of policy

(a) Legislative findings.—It is hereby determined and declared as a matter of legislative finding:

(1) If the public is provided adequate notice and information about sexually violent predators and certain other offenders, the community can develop constructive plans to prepare themselves and their children for the offender's release. This allows communities to meet with law enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to their children.

(2) These sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest.

(3) The penal and mental health components of our justice system are largely hidden from public view and lack of information from either may result in failure of both systems to meet this paramount concern of public safety.

(4) Overly restrictive confidentiality and liability laws governing the release of information about sexually violent predators have reduced the willingness to release information that could be appropriately released under the public disclosure laws and have increased risks to public safety.

(5) Persons found to have committed such an offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.

(6) Release of information about sexually violent predators to public agencies and the general public will

further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

(b) Declaration of policy.—It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective.

Historical and Statutory Notes

Section 2 of Act 1995-24 (Spec. Sess. No. 1), provides:

"The provisions of this act are severable. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application."

Notes of Decisions

Double jeopardy 1

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1. Double jeopardy

Hearing, pursuant to Megan's Law, giving court opportunity to determine whether person convicted of sexually molesting young children is sexually violent predator does not subject such person to double jeopardy, as it merely provides offender with presentence opportunity to rebut presumption

that he is sexually violent predator, and does not charge him with separate offense. Com. v. Davis, 708 A.2d 116, Super.1998, reargument denied.

§ 9792. Definitions

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The State Board to Assess Sexually Violent Predators.

"Mental abnormality." A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

"Municipality." A city, borough, incorporated town or township.

"Offender." An individual who is:

(1) designated a sexually violent predator under the provisions of this subchapter; or

(2) required to register under section 9793(b) (relating to registration of certain offenders for ten years).

"Predatory." An act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

"Sexually violent offense." Any criminal offense specified in section 9793(b) (relating to registration of certain offenders for ten years).

"Sexually violent predator." A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective.

§ 9793. Registration of certain offenders for ten years

(a) Registration.—A person convicted of any of the offenses set forth in subsection (b) shall be required to register a current address with the Pennsylvania State Police upon release from incarceration, upon parole from a State or county correctional institution, upon the commencement of a sentence of intermediate punishment or probation or where the offender is under the supervision of the Pennsylvania Board of Probation and Parole at the time of enactment of this section, within 30 days of the date of enactment of this section. Where the offender has been granted parole by the Pennsylvania Board of Probation and Parole, the board shall collect registration information from the offender and forward that registration information to the Pennsylvania State Police. The Department of Corrections shall not release the offender until it receives verification from the Pennsylvania State Police that it has received the registration information. Where the offender is scheduled to be released from a State correctional facility due to the expiration of the maximum term of incarceration, the Department of Corrections shall collect the information from the offender no later than ten days prior to the maximum expiration date. The Department of Corrections shall forward the registration information to the Pennsylvania State Police. Where the offender scheduled to be released due to the maximum expiration date refuses to provide the registration information, the Department of Corrections shall notify the Pennsylvania State Police of the failure to provide registration information and of the expected date, time and location of the release of the offender. The chief county probation and parole official in cooperation with a county correctional facility shall, in accordance with established guidelines, obtain the required information contained in section 9799.2(2) (relating to duties of Pennsylvania Board of Probation and Parole) regarding offenders released from a county sentence and to submit the information to the Pennsylvania Board of Probation and Parole and the Pennsylvania State Police. The offender in a county correctional facility shall not be released from incarceration or released to a sentence of probation or intermediate punishment until the information has been

obtained and submitted as required. The offender shall inform the Pennsylvania State Police within ten days if the offender changes residence. The offender shall register with a new law enforcement agency no later than ten days after establishing residence in another state. The period of registration shall be ten years.

(b) Persons required to register.—

(1) Persons convicted of any of the following offenses that are classified as a felony and involve a victim who is a minor:

18 Pa.C.S. § 2901 (relating to kidnapping) except by a parent.

18 Pa.C.S § 3121 (relating to rape).

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S § 3125 (relating to aggravated indecent assault).

18 Pa.C.S § 5902(b) (relating to prostitution and related offenses).

18 Pa.C.S § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances).

(2) Person convicted of any of the following offenses regardless of the age of the victim:

18 Pa.C.S. § 3121.

18 Pa.C.S. § 3123.

18 Pa.C.S. § 3125.

18 Pa.C.S. § 3128(a) and (b) (relating to spousal sexual assault).

(3) Persons convicted of 18 Pa.C.S. § 3126 (relating to indecent assault) when the offense is a misdemeanor of the first degree.

(c) Registration information.—The Pennsylvania State Police shall provide the information obtained under this section and sections 9795 (relating to registration of offenders) and 9796 (relating to verification of residence) to the chief law enforcement officer of the police department of the municipality in which the offender will reside. In addition, the Pennsyl-

vania State Police shall provide this officer with the address at which the offender will reside following his release from incarceration, parole or probation.

(d) Out-of-State offenders.—A person who is convicted of an offense equivalent to any of the offenses listed in subsection (b) in any other state or territory or the District of Columbia, or in any Federal court, and who, within ten years of his release or parole from incarceration, makes his residence in Pennsylvania shall be required to register a current address with the Pennsylvania State Police and shall be subject to the other provisions of this subchapter relating to registration. The period of registration shall be for ten years from the offender's release or parole from incarceration.

(e) Penalty.—Any offender who fails to register with the Pennsylvania State Police as required in this section commits a felony of the third degree.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

Section 3 of Act 1995-24 (Spec. Sess. No. 1, provides:

"The provisions of this act shall be applicable as follows;

"(1) All offenders convicted of an offense set forth in 42 Pa.C.S. § 9793(b) before the effective date of this section who remain under the jurisdiction of the Pennsylvania Board of Probation and Parole or the Department of Corrections shall be subject to the provisions of this act, with the exception of 42 Pa.C.S. §§ 9794, 9795(a), 9796(a), 9797, 9798 and 9799.4, which relate to sexually violent predators.

"(2) All offenders convicted of an offense set forth in 42 Pa.C.S. § 9793(b) committed on or after the effective date of this section shall be subject to all provisions of this act."

The 1996 amendment rewrote subsec. (a); in subsec. (b), added par. (3); and added subsecs. (d) and (e). Prior to amendment, subsec. (a) read:

"Registration.—A person convicted of any of the offenses set forth in subsection (b) shall be required to register a current address with the Pennsylvania State Police upon release

from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. The period of registration shall be ten years."

Pennsylvania Code References

Guidelines for administration of Megan's Law, see 37 Pa. Code § 56.1 et seq.

Notes of Decisions

Ex post facto 3
Residence 2
Validity 1

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1. Validity

Inmate serving sentence for sex offenses faced direct, substantial, and present threat of prosecution under sex offender registration statute, and therefore, inmate's action challenging constitutionality of such statute was ripe and justiciable, though inmate had no obligation under statute to provide any registration information until ten days before expiration of his prison term; failure to provide registration information was third-degree felony under statute, statute required department of corrections to notify police of release of any offender who had not provided information, inmate's release date was less than ten months away, and inmate would inevitably be subject to prosecution under statute due to nature of his offenses. Van Doren v. Mazurkiewicz, 695 A.2d 967, Cmwlth. 1997.

Statute requiring convicted sex offenders to register their address with state police upon release from incarceration did not impose "punishment" in violation of double jeopardy and ex post facto clauses; legislative purpose of statute was not to punish, but to effectuate nonpunitive purpose of protecting public, historical analysis of act of "registration" demonstrated that measure was not traditionally regarded as punishment, any detrimental effects of registration provisions were incidental to their salutary purpose and operation, and effects of reg-

istration provisions were both regulatory and remedial in nature. Van Doren v. Mazurkeiwicz, 695 A.2d 967, Cmwlth. 1997.

2. Residence

Issue of whether treatment facility or other institution was "residence" under statute requiring convicted sex offenders to register address of their residence upon release from prison could not be reviewed on inmate's petition for review, where issue was not raised in petition for review. Van Doren v. Mazurkiewicz, 695 A.2nd 967, Cmwlth.1997.

3. Ex post facto

Sex offender registration law (Megan's Law) requiring certain convicted sex offenders to register their address with state police did not constitute "punishment," and therefore, application of law to sex offender who committed sexual offense against minor four months before effective date of law did not violate Ex Post Facto Clause of either United States or Pennsylvania Constitution; purpose behind law was nonpunitive purpose of protecting safety and general welfare of people of the commonwealth. Com. v. Gaffney, 702 A.2d 565, Super. 1997, appeal granted in part 710 A.2d 605.

§ 9794. Designation of sexually violent predators

(a) Order for assessment.—After conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the board. The order for an assessment shall be sent to the administrative officer of the board within ten days of the date of conviction.

(b) Presumption.—An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

(c) Assessment.—Upon receipt from the court of an order for an assessment, two members of the board as desig-

nated by the administrative officer of the board shall conduct an assessment of the offender to determine if the offender is a sexually violent predator. Such an assessment shall include, but not be limited to, such factors as:

(1) Age of the offender.

(2) Offender's prior criminal record, sexual offenses as well as other offenses.

(3) Age of the victim.

(4) Whether the offense involved multiple victims.

(5) Use of illegal drugs by the offender.

(6) Whether the offender completed any prior sentence and whether the offender participated in available programs for sexual offenders.

(7) Any mental illness or mental disability of the offender.

(8) The nature of the sexual contact with the victim and whether the sexual contact was part of a demonstrated pattern of abuse.

(9) Whether the offense included a display of unusual cruelty by the offender during the commission of the crime.

(10) Any behavioral characteristics that contribute to the offender's conduct.

All State, county and local agencies shall cooperate in providing the necessary information as requested by the board in connection with the required assessment.

(d) Submission of report by board.—The board shall submit a written report containing its assessment to the court no later than 60 days from the date of conviction of the defendant. Where the board members disagree on the assessment of the offender, both members shall submit a written report to the court.

(e) Court review of findings.—Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In

addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

(f) Subsequent board review.—No sooner than one year prior to release from a State or county correctional institution, or in five-year intervals thereafter, an offender designated as a sexually violent predator may petition the court with original jurisdiction in the matter for reconsideration of the determination. The court may review the determination and request a new report by the board. The court may enter an order terminating the designation in which case the court shall notify the Pennsylvania State Police.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in subsec. (a), added the last sentence: in subsec. (c), inserted "Upon receipt from the court of an order for an assessment, two members of the board as designated by the administrative officer of" at the beginning of the introductory paragraph, and added the undesignated final paragraph; in subsec. (d), extended the time period from 30 to 60 days, and added the last sentence; and, in subsec. (e), required the court to set forth on the sentencing order its determination whether the presumption arising under subsec. (b) has been rebutted, and added the last sentence.

§ 9795. Registration of offenders

(a) Registration of sexually violent predators.—A sexually violent predator shall be required to register all current addresses with the Pennsylvania State Police upon release

from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. The offender shall inform the Pennsylvania State Police within ten days if the offender changes residence. The offender shall register with a new law enforcement agency no later than ten days after establishing residence in another state. The registration shall continue unless the court determines the person is no longer a sexually violent predator as provided in section 9794(f) (relating to designation of sexually violent predators). Where the offender has been granted parole by the Pennsylvania Board of Probation and Parole, the board shall collect registration information from the offender and forward that registration information to the Pennsylvania State Police. The Department of Corrections shall not release the offender until it receives verification from the Pennsylvania State Police that it has received the registration information. Where the offender is scheduled to be released from a State correctional facility due to the expiration of the maximum term of incarceration, the Department of Corrections shall collect the information from the offender no later than ten days prior to the maximum expiration date. The Department of Corrections shall forward the registration information to the Pennsylvania State Police. Where the offender scheduled to be released due to the maximum expiration date refuses to provide the registration information, the Department of Corrections shall notify the Pennsylvania State Police of the failure to provide registration information and of the expected date, time and location of the release of the offender. The chief county probation and parole official in cooperation with a county correctional facility shall, in accordance with established guidelines, obtain the required information contained in section 9799.2(2) (relating to duties of Pennsylvania Board of Probation and Parole) regarding offenders released from a county sentence and to submit the information to the Pennsylvania Board of Probation and Parole and the Pennsylvania State Police. The offender in a county correctional facility shall not be released from incar-

ceration or released to a sentence of probation or intermediate punishment until the information has been obtained and submitted as required.

(b) Court information for all offenders.—The sentencing court shall inform offenders designated in section 9793 (relating to registration of certain offenders for ten years) and sexually violent predators designated in subsection (a) at the time of sentencing of the provisions of this subchapter. The court shall:

(1) Specifically inform the offender of the duty to register and obtain the information required for each registration.

(2) Specifically inform the offender of the duty to inform the Pennsylvania State Police within ten days if the offender changes residence.

(3) Specifically inform the offender of the duty to register with a new law enforcement agency if the offender moves to another state no later than ten days after establishing residence in another state.

(4) Order the fingerprints and photograph of the person to be provided to the Pennsylvania State Police upon sentencing.

(5) Require the offender to read and sign a form stating that the duty to register under this subchapter has been explained. Where the offender is incapable of reading, the court shall certify the duty to register was explained to the offender and the offender indicated an understanding of the duty.

(c) Offenders from other states.—As a condition of obtaining residency in Pennsylvania under the interstate compact for the supervision of parolees and probationers, sexual offenders from other states shall be required to register and abide by the requirements of this subchapter and, where the Pennsylvania Board of Probation and Parole determines it is necessary to protect the public, shall submit to public notification as provided in section 9798 (relating to other notification).

(d) Penalty.—Any offender who fails to register with the Pennsylvania State Police as required in this section commits a felony of the third degree.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment rewrote subsecs. (a) and (c), which previously read:

"(a) Registration of sexually violent predators.—A sexually violent predator shall be required to register all current addresses with the Pennsylvania State Police upon release from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. The registration shall continue unless the court determines the person is no longer a sexually violent predator as provided in section 9794(l) (relating to designation of sexually violent predators)."

"(c) Notice by correctional facility and paroling authorities.—When the offender is to be released from incarceration or paroled from a State or county correctional facility, the prison official of the State or county correctional facility shall no later than ten days prior to the release or parole of the offender again provide the offender with notice of the duty to register with the Pennsylvania State Police under this subchapter."

§ 9796. Verification of residence

(a) Quarterly verification.—The Pennsylvania State Police shall verify the residence of sexually violent predators every 90 days through the use of a nonforwardable verification form to the last reported address. The form shall be returned by the offender within ten days.

(b) Annual verification.—The Pennsylvania State Police shall verify the residence of offenders designated in section 9793 (relating to registration of certain offenders for ten

years) annually through the use of a residence verification form. The form shall be returned by the offender within ten days.

(c) Notification of law enforcement agencies of change in address.—A change of address of an offender required to register under this subchapter reported to the Pennsylvania State Police shall be immediately reported by the Pennsylvania State Police to the appropriate law enforcement agency having jurisdiction of the offender's new place of residence. The Pennsylvania State Police shall, if the offender changes residence to another state, notify the law enforcement agency with which the offender must register in the new state.

(d) Failure to provide verification.—Where any offender fails to provide verification of residence within the ten-day period as set forth in this section, the Pennsylvania State Police shall immediately notify the municipal police department of the offender's last verified residence. The local municipal police shall locate the offender and arrest him for violating this section. The Pennsylvania State Police shall assume responsibility for locating the offender and arresting him in jurisdictions where no municipal police jurisdiction exists. The Pennsylvania State Police shall assist any municipal police department requesting assistance with locating and arresting an offender who fails to verify his residence.

(e) Penalty.—Any offender who fails to verify his residence as required in this section commits a felony of the third degree.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days.

§ 9797. Victim notification

(a) Duty to inform victim.—

(1) Where the offender is determined to be a sexually violent predator by a court under section 9794(e) (relating to designation of sexually violent predators), the local municipal police department or the Pennsylvania State Police where no municipal police jurisdiction exists shall give written notice to the offender's victim when the offender registers initially and when he notifies the Penn-

sylvania State Police of a change of address. This notice shall be given within 72 hours after the offender registers or notifies the Pennsylvania State Police of a change of address. The notice shall contain the offender's name and the address or addresses where he resides.

(2) A victim may terminate the duty to inform set forth in paragraph (1) by providing the local municipal police department or the Pennsylvania State Police where no local municipal police department exists with a written statement releasing that agency from the duty to comply with this section as it pertains to that victim.

(b) Where an offender is not designated as a sexually violent predator.—Where the offender is not determined to be a sexually violent predator by a court under section 9794(e), the offender's victim shall be notified in accordance with section 479.3 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.[1]

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days.

§ 9798. Other notification

(a) By municipality's chief law enforcement officer.—Notwithstanding any of the provisions of 18 Pa.C.S. Ch. 91 (relating to criminal history record information), the chief law enforcement officer of the police department of the municipality where a sexually violent predator lives shall be responsible for providing written notice as required under this section.

(1) The notice shall contain:

(i) The name of the convicted sexually violent predator.

(ii) The address or addresses at which he resides.

(iii) The offense for which he was convicted.

(iv) A statement that he has been designated by court order as a sexually violent predator, which designation has or has not been terminated as of a date certain.

1. 71 P.S. § 180-9.3.

(v) A photograph of the sexually violent predator, if available.

(2) The notice shall not include any information that might reveal the victim's name, identity and residence.

(b) To whom written notice is provided.—The chief law enforcement officer shall provide written notice, under subsection (a), to the following persons:

(1) Neighbors of the sexually violent predator.

(2) The director of the county children and youth service agency of the county where the sexually violent predator resides.

(3) The superintendent of each school district and the equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality.

(4) The director of each licensed day care center and licensed preschool program in the municipality.

(5) The president of each college, university and community college located within 1,000 feet of a sexually violent predator's address.

(c) Urgency of notification.—The municipal police department's chief law enforcement officer shall provide notice within the following time frames:

(1) To neighbors, notice shall be provided within 72 hours after information of the sexually violent predator's release date and address has been received by the chief law enforcement officer. Notwithstanding the provisions of subsections (a) and (b), verbal notification may be used if written notification would delay meeting this time requirement.

(2) To the persons specified in subsection (b)(2), (3), (4) and (5), notice shall be provided within seven days after the chief law enforcement officer receives information regarding the sexually violent predator's release date and address.

(d) Public notice.—All information provided in accordance with subsection (a) shall be available, upon request, to the general public.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in subsec. (a), required the chief law enforcement officer to provide notice regardless of the provisions of 18 Pa.C.S. Ch. 91 (relating to criminal history record information), and added par.(1)(v).

Law Review and Journal Commentaries

Surprise! You just moved next to a sexual predator. The duty of residential sellers and real estate brokers to disclose the presence of sexual predators to prospective purchasers. 102 Dick.L.Rev. 169 (1997).

§ 9799. Immunity for good faith conduct

The following entities shall be immune from liability for good faith conduct under this section:

(1) The Pennsylvania State Police and local law enforcement agencies and employees of law enforcement agencies.

(2) District attorneys and their agents and employees.

(3) Superintendents, administrators, teachers, employees and volunteers engaged in the supervision of children of any public, private or parochial school.

(4) Directors and employees of county children and youth agencies.

(5) Presidents or similar officers of universities and colleges, including community colleges.

(6) The Pennsylvania Board of Probation and Parole and its agents and employees.

(7) Directors of licensed day care centers and directors of licensed preschool programs.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in par. (3), added employees and volunteers engaged in the supervision of children of any public, private or parochial school to the list of immune entities.

§ 9799.1. Duties of Pennsylvania State Police

The Pennsylvania State Police shall:

(1) Create and maintain a State registry of offenders pursuant to section 9793 (relating to registration of certain offenders for ten years).

(2) In consultation with the Office of Attorney General and the Pennsylvania Board of Probation and Parole, promulgate guidelines necessary for the general administration of this subchapter.

(3) Write regulations regarding neighbor notification of the current address of sexually violent predators.

(4) Notify, within 72 hours of receiving the offender's registration, the chief law enforcement officer of the police department having primary jurisdiction of the municipality in which an offender resides of the fact that the offender has been registered with the Pennsylvania State Police pursuant to sections 9795 (relating to registration of offenders) and 9796 (relating to verification of residence).

(5) In consultation with the Department of Education and the Pennsylvania Board of Probation and Parole, promulgate guidelines directing licensed day-care centers, licensed preschool programs, schools, universities and colleges, including community colleges, on the proper use and administration of information received under section 9798 (relating to other notification).

(6) Immediately transfer the information received from the Pennsylvania Board of Probation and Parole under section 9799.2(2) and (3) (relating to duties of Pennsylvania Board of Probation and Parole) and the fingerprints of the sexually violent predator to the Federal Bureau of Investigation.

All guidelines and regulations promulgated under this section shall be published in the Pennsylvania Bulletin no later than January 1, 1996.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective. Amended 1996, May 22, P.L. 300, No. 46 § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in par. (5), substituted "section 9798 (relating to other notification)" for "section 9797 (relating to victim notification)".

§ 9799.2 Duties of Pennsylvania Board of Probation and Parole

The Pennsylvania Board of Probation and Parole shall:

(1) Create a notification form which will inform State and county prison and probation and parole personnel how to inform offenders required to register under this subchapter of their duty under the law.

(2) In cooperation with the Department of Corrections and other Commonwealth agencies, obtain the following information regarding offenders:

(i) Name, including any aliases.

(ii) Identifying factors.

(iii) Anticipated future residence.

(iv) Offense history.

(v) Documentation of any treatment received for the mental abnormality or personality disorder.

(vi) Photograph of the offender.

(3) Immediately transmit the information in paragraph (2) to the Pennsylvania State Police for immediate entry into the State registry of sexual offenders and the criminal history record of the offender as provided in 18 Pa.C.S. Ch. 91 (relating to criminal history record information).

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in par. (2), in the introductory paragraph, required the Board of Probation and Parole to obtain the information in cooperation with the Department of Corrections and other Commonwealth agencies, and added cl. (vi).

§ 9799.3 Board

(a) Composition.—The State Board to Assess Sexually Violent Predators shall be composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders.

(b) Appointment.—The Governor shall appoint the board members.

(c) Term of office.—Members of the board shall serve four-year terms.

(d) Compensation.—The members of the board shall be compensated at a rate of $200 per assessment and receive reimbursement for their actual and necessary expenses while performing the business of the board. The chairman shall receive $500 additional compensation per annum.

(e) Staff.—Support staff for the board shall be provided by the Pennsylvania Board of Probation and Parole.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective. Amended 1996, May 22, P.L. 300, No. 46 § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment rewrote subsecs. (a) and (b); and, in subsec. (d), increased the rate of compensation from "$125 per day" to "$200 per assessment". Prior to amendment subsecs. (a) and (b) read:

"(a) Composition.—The State Board to Assess Sexually Violent Predators shall be composed of three persons, one psychiatrist, one psychologist and one criminal justice expert,

each of whom has a minimum of ten years of experience and specialized training in the behavior and treatment of sex offenders.

"(b) Appointment.—The Governor shall appoint the psychiatrist and psychologist board members. The Attorney General shall appoint the criminal justice expert. All appointments shall be made within 30 days of the effective date of this section."

§ 9799.4. Sexually violent predators

(a) Increased mandatory maximum sentence.—Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

(b) Counseling.—The sexually violent predator shall be required to attend at least monthly counseling sessions in a program approved by the board and be financially responsible for all fees assessed from such counseling sessions. If the sexually violent predator can prove to the satisfaction of the court that the person cannot afford to pay for the counseling sessions, that person shall still attend the counseling sessions and the parole office shall pay the requisite fees.

(c) Mandatory sentence.—Notwithstanding any other provision of law to the contrary, when a person who has been designated as a sexually violent predator is convicted of a subsequent sexually violent offense, the mandatory sentence shall be life imprisonment. Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the offender shall have the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

(d) Authority of court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in

subsection (c), to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

(e) Appeal by Commonwealth.—If a sentencing court refuses to apply this section when it is applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for the imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46 § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment rewrote subsec. (a); added a new subsec. (b); and redesignated former subsecs. (b) to (d) as subsecs. (c) to (e).

§ 9799.5. Exemption from notification

Nothing in this subchapter shall be construed as imposing a duty upon a person licensed under the act of February 19, 1980 (P.L. 15, No. 9), known as the Real Estate Licensing and Registration Act, or an employee thereof to disclose any information regarding an offender required to register under this act.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days.

§ 9799.6. Applicability

The provisions of section 9793(d) (relating to registration of certain offenders for ten years) shall apply to all offenders convicted of an offense equivalent to an offense set forth in

section 9793(b) before the effective date of this section who remain incarcerated or on parole on the effective date of this section. In addition, the provisions of section 9793(d) shall apply to all offenders convicted of an offense equivalent to an offense set forth in section 9793(b) on or after the effective date of this section.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days, added 1996, May 22, P.L. 300, No. 46, § 3, imd. effective.

(2)

No. 99-709

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In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

DONALD FRANCIS WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of a rebuttable presumption in a proceeding under the Pennsylvania Sexual Offender's Act, in which a court must make the factual determination of whether a convicted sex offender qualifies as a Sexually Violent Predator and is therefore subject to a maximum sentence of life imprisonment in excess of any sentence he/she could otherwise lawfully receive, improperly shifts the burden of proof to the offender in violation of his/her right to due process under the Fourteenth Amendment?

Answered in the affirmative by the Pennsylvania Supreme Court.

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OPINION BELOW

The decision of the Pennsylvania Supreme Court is published at *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999). The unpublished opinion of the trial court appears as Appendix A of the Petition For a Writ of Certiorari.

STATEMENT OF JURISDICTION

On September 28, 1999, Joseph P. Conti, Esquire, the District Attorney of Erie County, Pennsylvania, filed a Petition for Writ of Certiorari from the June 30, 1999 decision of the Pennsylvania Supreme Court in *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999), pursuant to Supreme Court Rule 10(c), 28 U.S.C. § 1257(a). The petition was resubmitted and docketed on October 26, 1999. Respondent's Brief in Opposition is filed within thirty days of October 26, 1999, pursuant to Supreme Court Rule 15(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause contained in Section 1 of the Fourteenth Amendment of the United States Constitution states as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

The relevant Pennsylvania statute, contained in Title 42, Subchapter H of the Pennsylvania Consolidated Statutes, entitled "Registration of Sexual Offenders," is attached to the Petition For A Writ Of Certiorari as the first exhibit of the Petitioner.

STATEMENT OF THE CASE

Procedural History

Mr. Williams was arrested and charged by information with two counts of Involuntary Deviate Sexual Intercourse ["IDSI"] as first degree felonies, two counts of Indecent Assault as misdemeanors in the first degree, and one count of Corruption of Minors as a misdemeanor in the first degree. He was tried by a jury on July 15, 1997, and found guilty of all charges. Following Mr. William's conviction, but before the imposition of sentence, Judge Ernest J. DiSantis, Jr., issued an Order directing the State Board to Assess Sexual Offenders (hereinafter "the Board") to perform an assessment of Mr. Williams pursuant to 42 Pa.C.S.A. §§ 9791, et seq. ("Registration of Sexual Offenders") to determine whether he qualified as a Sexually Violent Predator. The judge ordered that the Board submit a report to the court prior to a hearing at which the court would determine whether Mr. Williams was a Sexually Violent Predator.

In response to this order, Mr. Williams filed a Motion for Extraordinary Relief raising numerous constitutional challenges to the applicable provisions of the Registration

of Sexual Offenders Act. Among the claims raised in the motion, Mr. Williams contended that it was a violation of his right to Due Process under the Fourteenth Amendment of the United States Constitution for the Commonwealth to enforce a rebuttable presumption in an adjudicatory proceeding within which a factual determination would be made as to whether he was a Sexually Violent Predator, where one of the consequences of that finding would be the increase of his sentence to a mandatory maximum sentence of life imprisonment, greatly in excess of any sentence he could otherwise lawfully receive for his crimes. Mr. Williams specifically objected that the application of a rebuttable presumption would shift of the burden of proof in the adjudicatory proceeding from the Commonwealth to the defendant.

The trial court granted the motion on September 23, 1997. In an Order and Opinion the trial court concluded that the application of a rebuttable presumption in this proceeding would violate Mr. William's right to due process of law. The trial court refused to impose the enhanced sentence of life under the applicable provisions of "Registration of Sexual Offenders," and instead sentenced Mr. Williams within those ranges that are provided for by the statutes governing the offenses for which Mr. Williams was charged and convicted. On October 22, 1997, the Commonwealth filed an appeal to the Pennsylvania Supreme Court.

On September 16, 1998, the Pennsylvania Supreme Court heard argument on six consolidated cases, including the instant matter, *Commonwealth v. Donald Francis Williams*, No. 84 W.D. Appeal Docket 1997, No. 14 W.D. Appeal Docket 1998. On June 30, 1999, the Pennsylvania

Supreme Court issued an opinion in the present case affirming the decision of the trial court and striking "all of the relevant provisions of the Act pertaining to sexually violent predators." The Pennsylvania Supreme Court found that those provisions were "violative of the procedural due process guarantees of the Fourteenth Amendment." *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593, 608 (June 30, 1999).

On September 28, 1999, Joseph P. Conti, Esquire, the District Attorney of Erie County, Pennsylvania, filed the instant Petition for Writ of Certiorari from the above decision.

The Statute

Pennsylvania's Registration of Sexual Offenders Act, 42 Pa.C.S.A. §§ 9791 to 9799.6, addresses three major classifications: 1) Offenders; 2) Out-of-State Offenders; and 3) Sexually Violent Predators. "Offenders" are persons convicted of enumerated sex offenses that range from first degree misdemeanors to first degree felonies. Under the Act, "Offenders" must register with the state police for a period of ten years. "Out-of-State Offenders" are persons convicted of any of the same range of offenses in another state, who have had the supervision of their parole or probation transferred to Pennsylvania. Under the current version of the statute, this classification of persons is subject to public notification, in addition to the requirement of registration.

"Sexually Violent Predators" are persons convicted of any crime in the above range of offenses that occurred after the passage of the Act, if a court has subsequently

determined that they meet the definition contained in the statute. The most significant consequence of this adjudication is set out in Section 9799.4(a) of the Act, as follows:

> **(a) Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

In addition, if the individual is ever subsequently paroled,[1] he or she is subject to public notification and lifetime registration.

The definition of "sexually violent predator" is similar to that with which this Court dealt in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2085 (1997). Under Section 9792 of the Act, the term is defined as follows:

> **"Sexually violent predator."** A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that

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[1] In Pennsylvania the Parole Board has been given "exclusive power to grant or deny parole to a prisoner." *Rogers v. Board of Probation and Parole*, 555 Pa. 285, 289, 724 A.2d 319, 321 (1997). A prisoner has no right to appellate review from a Parole Board decision denying parole. *Id.* at 292, 724 A.2d at 323.

> makes the person likely to engage in predatory sexually violent offenses.

The definition of "mental abnormality" states:

> **"Mental abnormality."** A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

The term "personality disorder" is not defined in the statute. The term "predatory", however, is defined as "[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." 42 Pa.C.S.A. § 9792. Finally, a "sexually violent offense" is defined as any offense listed in Subsection 9793(b) of the Act, which includes a selection of sexual offenses ranging from indecent assault as a misdemeanor in the first degree (punishable by a term of two and a half to five years), to rape as a first degree felony (punishable by a term of ten to twenty years), plus the crime of kidnapping a child (except by a parent) and certain crimes involving a minor "relating to [the production of] obscene and other sexual materials and performances."

The adjudicatory procedure established by the Act starts with an assessment and report prepared by a "State Board to Assess Sexually Violent Predators," which consists of "psychiatrists, psychologists and criminal justice experts" appointed by the Governor. 42 Pa.C.S.A. §§ 9794, 9799.3. The Board is guided in its determination by a presumption that the defendant is a "sexually violent

predator," which may be rebutted by clear and convincing evidence, although "[t]he offender does not participate in the assessment proceeding by the Board," *Williams, supra* at 596. The Act declares:

> **(b) Presumption.** – An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa.C.S.A. § 9794(b). The court hearing referred to in subsection (e) operates as follows:

> **(e) Court review of findings.** – Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

42 Pa.C.S.A. § 9794(e). Contrary to the suggestion of the Petitioner (*see* Petition for Writ of Certiorari, at 2), there is no requirement in the statute that the report of the Board be "provided to the parties prior to the hearing" or that its members be present – "available to be called as witnesses by either party." *Ibid.*

Once a court has determined that an individual is a Sexually Violent Predator, it has no authority to impose any sentence less than the "increased mandatory maximum sentence" of life described in Subsection 9799.4(a). If the court "refuses to apply this section when it is applicable, the Commonwealth shall have the right to appellate review," and the appellate court must vacate and remand for imposition of the enhanced sentence "in accordance with this section." 42 Pa.C.S.A. § 9799.4(e).

While the Petitioner is correct that all fifty states have enacted sexual offender legislation (*see* Petition for Writ of Certiorari, at 3), the procedures incorporated in the Pennsylvania statute are unique. They appear to be modeled upon statutes prevalent during the post-war years that were struck down in a series of decisions by this and other courts. *See Specht v. Patterson*, 386 U.S. 605, 608, 87 S.Ct. 1209 (1967) (Colorado Sex Offenders' Act); *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966) (Barr-Walker Act; 19 PS §§ 1166-1174); *Commonwealth v. Dooley*, 209 Pa.Super. 516, 232 A.2d 45 (1967) (Barr-Walker Act).

REASONS FOR OPPOSING THE WRIT

THE PENNSYLVANIA SUPREME COURT HAS INVOKED PRINCIPLES OF LAW REPEATEDLY ARTICULATED BY THIS COURT TO REJECT IN THIS UNIQUE STATUTE THE APPLICATION OF A REBUTTABLE PRESUMPTION IN AN ADJUDICATORY PROCEEDING USED TO DETERMINE FACTS THAT WOULD RESULT IN THE ENHANCEMENT OF PUNISHMENT FAR BEYOND THE STATUTORY MAXIMUMS THAT COULD LAWFULLY BE IMPOSED FOR THE RANGE OF CRIMINAL OFFENSES AT ISSUE HERE.

Petitioner's reasons for requesting appellate review are less than persuasive for two reasons. First, Petitioner persists in presenting an interpretation of the Pennsylvania Registration of Sexual Offenders Act that was rejected by the Pennsylvania Supreme Court. Because it is the prerogative of the Pennsylvania Supreme Court to interpret legislation of the Commonwealth, it is incumbent upon the Petitioner to address the Act as it has been interpreted when presenting its analysis to this Court. Second, as the Pennsylvania Supreme Court has noted in its opinion, Petitioner's position is indefensible even under its own interpretation of the statute. *See Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593, 603 (June 30, 1999).

As it did before the Pennsylvania Supreme Court, Petitioner argues that the Pennsylvania Registration of Sexual Offenders Act is a mere sentencing proceeding under which an individual is given the opportunity to mitigate sentence. *See* Petition for Writ of Certiorari, at 8. The Petitioner's argument is belied by its own assertion: "If the legislature merely chose a maximum penalty of

life in prison for these offenses, it could have done so." Petition for Writ of Certiorari, at 6. As the Pennsylvania Supreme Court recognized, and the statute clearly demonstrates, the Legislature did not choose that course. Instead, the Legislature adopted a model incorporated within a series of statutes passed during the post-war years that were later struck down by this and other courts based upon the Due Process Clause of the Fourteenth Amendment. *See Specht v. Patterson*, 386 U.S. 605, 608, 87 S.Ct. 1209 (1967) (Colorado Sex Offenders' Act); *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966) (Barr-Walker Act; 19 PS §§ 1166-1174); *Commonwealth v. Dooley*, 209 Pa.Super. 516, 232 A.2d 45 (1967) (Barr-Walker Act). At the time that these cases were decided, and repeatedly thereafter, this Court described the scheme promulgated by these statutes as "a separate criminal proceeding" which was "radically different" from a mere sentencing proceeding, and within which a defendant is entitled to the full panoply of due process protections.[2] *See Specht, supra* at 608-09, 87 S.Ct. at 1211-12; *McMillan v. Pennsylvania*, 477 U.S. 79, 89, 106

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[2] In *Specht* this Court explained:

> The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public. . . . That is a new finding of fact that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.

386 U.S. at 608-09, 87 S.Ct. at 1211-12 (citation omitted).

S.Ct. 2411, 2418 (1986); *Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 1230 (1998) ("the Colorado defendant in *Specht* was 'confronted with "a radically different situation" from the usual sentencing proceeding,' " quoting *Specht* and *McMillan*).

The Pennsylvania Supreme Court reasonably and correctly categorized Pennsylvania's statute as being like those already found constitutionally lacking, and it appropriately distinguished *McMillan*, upon which Petitioner principally relies. After carefully analyzing the applicable portions of the Registration of Sexual Offenders Act, the Pennsylvania Supreme Court declared:

> Initially, we note that the proceedings whereby one is determined to be a sexually violent predator set forth in the Act are more akin to the provisions found in *Specht* and *Gerchman* than the provisions at issue in *McMillan*. As in *Specht* and *Gerchman*, the determination of whether one is a sexually violent predator is a separate factual question that commences following an offender's conviction of one of the specified offenses found in the Crimes Code.

Williams, 733 A.2d at 601.

The determinative factor that distinguishes a sexually violent predator hearing under this Act from the "mere sentencing proceeding" posited by Petitioner is the fact that persons convicted of the range of predicate offenses listed in Subsection 9793(b) of the Act **cannot** be sentenced to the enhanced term of life imprisonment **unless** they have first been adjudicated to be a Sexually Violent Predator. In *McMillan, supra*, this Court confronted this issue. There the defendant challenged the imposition of a

five year mandatory sentence that was based upon a finding made by a judge at a sentencing hearing that the offender "visibly possessed a firearm" during the course of a robbery. *Id.* at 81. This Court held, by a five to four vote, that due process did not require the state to prove the visible possession of a firearm by a burden or proof greater than "a preponderance of the evidence." Significantly, the Court distinguished the circumstances in *McMillan* from those in *Specht*, stating that the mandatory sentencing statute in *McMillan*,

> . . . neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of a visible possession of a firearm.

McMillan, supra at 87-88, 106 S.Ct. at 2417.[3]

This, however, is precisely what occurs when a person is adjudicated a "Sexually Violent Predator." Indeed, the language of the Legislature is straightforward:

> § 9799.4. Sexually violent predators
>
> **(a) Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section

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[3] The significance of this distinction has been repeatedly noted by this Court. *See Witte v. United States*, 515 U.S. 389, 401, 115 S.Ct. 2199, 2207 (1995); *Schad v. Arizona*, 501 U.S. 624, 644 n.9, 111 S.Ct. 2491 (1991).

> 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

42 Pa.C.S.A. § 9799.4 (emphasis in original). Those lesser statutory penalties applicable to respondent's offenses range a maximum sentence of five years for a misdemeanor of the first degree, to a maximum sentence of twenty years for a felony of the first degree. 733 A.2d at 602 n.11. The Pennsylvania Supreme Court focused on this issue when it interpreted the Act as establishing something "radically different" from the mere sentencing proceeding that Petitioner continues to urge. *Williams*, 733 A.2d at 602.

Petitioner suggests that the burden of proof at a Sexually Violent Predator hearing can be shifted to the defendant by requiring him to disprove by clear and convincing evidence that he fits the complex definition of a Sexually Violent Predator. However, this assertion is directly contrary to the decisions of this Court that have discussed the issue, starting with *Specht*. Ironically, the language that was used in *Specht* to describe what procedural protections were appropriate for the defendant in that Colorado hearing came from a decision that declared the Barr-Walker Act unconstitutional – the same Pennsylvania statute that served as a model for the current legislation. *See Gerchman, supra*. This Court quoted from *Gerchman* as follows:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to

> a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.
>
> We agree with that view.

386 U.S. at 610-11, 87 S.Ct. at 1212 (citation omitted), *quoting United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966).

The "protections" defended by Petitioner are "niggardly" indeed. The rebuttable presumption of Section 9794(b), which requires that a defendant prove that he is not a Sexually Violent Predator by "clear and convincing evidence," is no protection at all. Indeed, although the rebuttable presumption is applied by the assessment board, the accused is deprived of any opportunity to even make rebuttal. Under the statute the accused may not appear before that Board, present evidence, cross-examine witnesses, or argue his case. *See Williams*, 733 A.2d at 596. He is forced to rebut a report with the decks literally stacked against him.

Clearly a rebuttable presumption would not be sufficient "protection" even if it were used in a *Hendricks* type proceeding, where the judge's determination of fact resulted in a lesser deprivation of liberty – an involuntary commitment in a mental health facility. *See Kansas v.*

Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997). In contrast, here the ultimate consequence may be that a defendant is eligible for thirty or forty years of incarceration in a penal institution above and beyond the maximum sentence the defendant would otherwise lawfully receive. The difference between a five year or even a twenty year maximum sentence, and life imprisonment, is difficult to quantify, but easy to understand. It is a significant period of punishment, and a severe deprivation of liberty.

An increased sentence, however, is not the only consequence of an adjudication under the Registration of Sexual Offenders Act. A second consequence is public notification, if the inmate is ever paroled.[4] Once a person has been adjudicated a Sexually Violent Predator, the local police are required to provide written notice of the name, address, photograph and the status of that individual as a "Sexually Violent Predator" to all persons living in his/her neighborhood, and to a wide variety of other recipients. 42 Pa.C.S.A. § 9798. Quoting from a recent decision of the Third Circuit, the Pennsylvania Supreme Court emphasized,

> that notification puts the registrant's livelihood, domestic tranquility, and personal relationships all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least [as long as the notification continues]. As the New Jersey Supreme Court recognized in *Doe [v. Poritz*,142 N.J. 1, 662 A.2d 367 (N.J., 1995)], a registrant thus has a compelling interest in an accurate and reasonable disposition of

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[4] *See* footnote 1, *supra*.

> the issues before the court in a Megan's Law hearing.

Williams, supra at 606, quoting *E.B. v. Verniero,* 119 F.3d 1077, 1107 (3rd Cir. 1997), *cert. denied, Verniero v. W.P.,* 522 U.S. 1110, 118 S.Ct. 1039 (1998).

Thus, even if the Pennsylvania Supreme Court had not interpreted this adjudication as constituting a "separate criminal proceeding," it would have been justified in rejecting the Petitioner's contention that allowing the defendant to rebut the presumption contained in the Registration of Sexual Offenders Act is a Due Process "protection" adequate to safeguard the interest an offender has in not being erroneously subject to public notification and a term of life imprisonment.

In *Verniero,* which involved a civil proceeding that dealt solely with public notification, the Third Circuit held that the State must prove its case by "clear and convincing evidence." *Verniero, supra* at 1111. There the fact finder was required to make a determination concerning an accused's future dangerousness; a task which the circuit court characterized as "an undertaking involving substantial uncertainty." *Id.* at 1108. Here the fact finder is required to make a similar, complex determination; one that is nearly identical to that made by the civil court in *Kansas v. Hendricks, supra,* which was required to determine whether an offender had a "mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." In upholding the statute in *Hendricks,* this Court noted that the Kansas Legislature had "provided strict procedural safeguards," including placing the burden upon

the state to prove its case beyond a reasonable doubt. *Hendricks, supra* at 368-69, 117 S.Ct. at 2085. In light of *Specht* and *Verniero,* the Pennsylvania court properly rejected the Petitioner's suggestion that the burden of proof in any such proceeding could be shifted and placed upon the defendant.

Finally, contrary to the Petitioner's assertion, the Pennsylvania Supreme Court did acknowledge the "strong presumption that legislative enactments do not violate the constitution." *Contrast* Petition for Writ of Certiorari, at 7, *with Williams,* 733 A.2d at 603. It carefully examined the Pennsylvania "Megan's Law" statute, which is unique among the fifty states. Having done so, the Pennsylvania court correctly decided that the procedure contained in the Registration of Sexual Offenders Act violates the Due Process Clause of the Fourteenth Amendment. This Court should not grant certiorari to review a decision that is consistent with its long established case law.

CONCLUSION

For the reasons stated above, respondent respectfully requests that a writ of certiorari to review the decision below be denied.

Respectfully submitted,

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